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Law of Agency

A. Applications of Agency

1. Agency—An Indispensable Component of Modern Legal Systems

Agency is recognized in all modern legal systems as an indispensable part of the existing social order. It fulfills the most diverse functions in the public and private law of today; in particular, it assists in organizing the *division of labor* in the national and international economy, by making it possible for a principal to extend his individual sphere of activity. By its aid,[1] spanning space and time, he is able to have one or more persons act for him, in his stead, if necessary.[2] In this way, the need of legal representation in some form has increased as business units came to involve transactions conducted at a distance (as in the case of factors) or grew in size (the firm, the house, the corporation). On the whole, agency has been of almost equal importance with contract as a device facilitating the development of the modern business structure. Moreover, it has been a fertile matrix of specialized adjustments like assignment, the power of a mortgagee to foreclose by sale, even after the mortgagor's death, and quite recently the generally binding standard scale of wages made by the trade-unions or the suability of an unincorporated labor union.[3]

The present applications of agency are innumerable—in good part because of its great flexibility. By virtue of an authority (*Vollmacht*), not only do universal, general, and special agents, from the dependent agent to the agent who controls his principal, stand in the place of others for legal purposes, but they also include supraindividual organizations cul-

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[1] "By agency the individual's legal personality is multiplied in space." Pollock, On Contract (13th ed. 1950) 45.

[2] Beyond this, the idea of agency and with it of representation generally, forms a characteristic feature of our modern mass society, "parce que . . . la civilisation de chaque individualité humaine a dégagé une personnalité pleine de similitudes représentatives," Hauriou, Leçons sur le mouvement social (1899) 82. *Cf.* also Max Weber, 1 Wirtschaft und Gesellschaft (3rd ed. 1947) Ch. 1, §11, p. 25.

[3] Llewellyn, "Agency" in 1 Encyclopedia of the Social Sciences, (4th ed. 1937), 483–485, see also my article on "German Law" in 10 Encyclopaedia Britannica, (1957) 216.

minating in legal persons,[4] which themselves again may be principals or agents. While agency, as presently admitted in nearly all jurisdictions, with diminishing individual responsibility and increasing anonymity and impersonality, has unfortunate effects in legal commerce, on the other hand, its advantages for the institutions of modern life, based upon the division of labor, predominate to an extent that agency is everywhere prevalent. An agent is appointed whenever an individual is unable to act himself on account of his manifold occupations, absence, illness, advanced age, etc. Or a representative may be designated in order to take advantage of his special capacity, knowledge, and experience. Even mere desires, such as not to appear personally in order to avoid animosity, controversy, etc., or similar considerations, lead to the interposition of a representative.

2. Difficulties in the Legal Recognition of Agency

Prior to the recognition of agency, serious obstacles first had to be overcome. For the conception of representation is not a simple one; it is the result of a highly developed legal idea.[5] In the first place, the principle of externality, of the formal effect of certain declarations of the parties and procedures, characteristic of primitive law, stood in the way. These were binding, since a required form was correctly performed. Accordingly also, under the influence of this doctrine, a legal transaction could have effect only as against those persons who themselves had participated in the formal transaction.[6] When these formal obstacles were overcome, agency still was not admitted even in the Roman civil law, although the conception was already known in Greek, Egyptian, and

[4] Obviously this relationship according to which the composite forms of organisations go back to the authority, to representation, as their theoretical cell, is concealed by continental European jurisprudence through their opposition of organ-representative. This goes back to Otto von Gierke, Deutsches Privatrecht (1895) I, 497 ff., according to whom the fundamental distinction between representative and organ appears in that the organ acts not for another and in its activity reveals the life of the juristic person. Thus also the Report of the Preliminary Draft of a uniform Law of Agency of the Rome Institute (1955), also emphasizes that "the law does not apply to the legal position of the officials of corporations because these officials are part of the corporation for which they are acting." But in the last analysis also in the internal arrangements of a juristic person, there is always involved the problem of acts of another, since the final center of construction in private law is the human being.

[5] Haesaert, Théorie générale du droit (1948) 419; Labbé in Ortolan, Législation Romaine, (12th ed.) Vol. 3, Explications historiques des instituts, App. IX, at 865, still characterizes agency as a fiction, "l'inverse de la réalité, une subtilité, un raffinement contraire à la rudesse des premiers usages."

[6] See 2 Pollock and Maitland, History of English Law, (2nd ed. 1898) 219 ff.; Holdsworth, 8 History of English Law, (1925) 222; Würdinger, Geschichte der Stellvertretung in England, (1933) 1 ff.

Jewish law. As Rabel has shown in intensive researches, the full development of the principle of representation was "absolutely nowhere reached before the time of the reception."[7]

The lack of agency in Rome was due chiefly to the Roman conception of the personal nature of the obligation as liability (*Haftung*). Thus, the same ground which in Rome opposed the admission of cession, was also the chief obstacle to the development of agency.[8] In practice indeed, the lack of agency in Rome did not create serious difficulty, as the Roman law held tenaciously to the patriarchal family organization. Moreover, in contrast to Egypt and Judea, Rome was a city whose small area did not imperatively require representation by free persons. The existing needs in any event were taken care of for the most part by members of the family and slaves subject to the absolute power of the head of the family, who acquired only for the *pater familias*.[9]

3. *Agency and Legal Representation*

Until the 17th century, therefore, dogmas, such as that no one is bound against his will and also that a morally conceived legal responsibility can be established only by one's own act, impeded recognition of agency.[10] Natural law[11] first introduced a systematic development of authorized agency, after the Canon Law in 1298 in the Bonifatiana had allowed representation (more correctly, acting through a *nuntius*) in the marriage ceremony.[12]

Natural law requirements thus led under the banner of the Enlightenment also to the attribution of far wider functions to the idea of agency in the sphere of continental law than in Anglo-American law. It was made to serve the purpose of having someone act on behalf of persons who are unable fully to exercise their rights and discharge their duties on

[7] 1 Atti del Congresso internazionale di Diritto Romano (Pavia 1934) 235.

[8] Only by turning to account the notion of agency was assignment of debts accomplished; even negotiable paper carries, in the obligatory formulary words "order" or "bearer," the marks of its origin in an agency to collect (thus Llewellyn, *op. cit.*, 484).

[9] Schlossmann, Die Lehre von der Stellvertretung nach römischem und heutigem Recht (1881); L. Mitteis, Die Lehre von der Stellvertretung nach römischem Recht (1885); Hans I. Wolff, Theorie der Vertretung (1934) 111 ff.; Lee, Elements of Roman Law (3rd ed.) 329; Sir John Wessels, The Law of Contract in South Africa (2nd ed.) 1745, and especially R. Powell, "Contractual Agency in Roman Law and English Law," South African Law Review (1956) 41.

[10] The Code Civil still provides in Art. 1165, "les conventions n'ont d'effet qu'entre les parties contractantes," so that the present literature finds itself compelled to add "et à l'égard des personnes qui y ont été valablement représentées" (e.g., 4 Aubry et Rau, Cours de droit civil Français, (4th ed. 1871) §346).

[11] See, for example, Hugo Grotius, 2 De iure belli ac pacis, 11 §18 and outstanding, Coing, in Staudinger (Kommentar zum BGB, 11th ed., 1956) Preliminary note 5 before §164.

[12] C. 9 in VI° 1.19 (*Cf.* today Canons 1088/9).

account of their age or their mental or physical incompetence. With the transformation of this relationship from a relationship of power to one of protection, agency grew in significance. Thus today, "legal representation"—that is to say, agency arising from a provision of law—in continental law serves to organize the protection of minors, which is provided in Anglo-American law chiefly by the "trustee." Indeed, through the attribution of legal capacity by means of legal representation to individuals who do not have capacity to act, much the same social effect is achieved as through statutory administration by fiduciaries (*Treuhänder*) for those without capacity for transactions and rights.

The axiom that every individual by virtue of his freedom as a moral being is in the "nature of things" a legal subject, is the starting point for this concept of legal representation. Even the mentally incompetent and the minor child are subjects of rights. For them and in their place, a curator need appear as "representative" only during their temporary incompetence. In this way, along with the distinction of capacity to acquire rights and to engage in transactions, with the aid of the conception of agency, is the principle realized that every human being is a legal subject. Hence, the rights in the case of a ward are conceived as a focal point, as potentially endowed with will, which the legal representative has to exercise in the interest of the ward. Thus, through the institution of the "legal representative," the continental jurisprudence surmounts the fact that before attaining majority an incompetent person may decide nothing and the representative must decide everything, and yet the incompetent person must be a subject in a legal system that regards intelligent self-determination as the cornerstone of subjective rights. It is true that such representative, strictly speaking, thus enjoys a capacity which the ward who is represented does not himself possess. However, to conceal this, the incapacity of the ward to act is regarded as only a temporary, passing exception to the fundamental criterion of the will of the legal subject, always remaining in principle.

For practical purposes, this civil-law solution of guardianship through general legal representation is distinguished from the common-law method[13] of special trustees—administrator *durante minore aetate*, next friend, guardian *ad litem*, etc.—chiefly by the fact that it does not derive like the trust doctrine from the estate of the ward. In the conception of

[13] Of course the institution of agency by law is not entirely unknown. It appears, however, only in very few exceptional cases. *Cf.* Mechem, 2 Agency (2nd ed. 1914) 15. On the situation in South African law, *cf.* de Villiers and Macintosh, The Law of Agency in South Africa (2nd ed. 1956) 8.

"legal representation," there is always present an *alter ego* of the ward, irrespective of whether there exist rights to be protected by a fiduciary. Yet this does not cover all questions. Thus, for example, it cannot explain how the father or guardian can demand that the child be restored by one who holds it illegally. As the child who is represented cannot in one person be a subject and, as the subject matter of the restitution, at the same time an object, the principle of agency here breaks down. In this case, there remains also for the continental law no other alternative than to recognize the official appointment of the guardian, his position as a fiduciary administrator.

4. Agency and Tort Liability

On the other hand, in contrast to Anglo-American law, continental law includes only the undertaking of *legal transactions* in the place of another as "agency." It excludes other acts (nonjuristic acts), including unlawful acts.

Continental law distinguishes these two categories on account of the difference of their basic justifications. The legal viewpoint, in accordance with which liability is imposed on the master on account of the unlawful conduct of his servants, is fundamentally different from that which establishes the liability of the principal for the declarations of the agent. Thus, it is appropriate that, in the law concerning unlawful acts, the immediate actor should himself primarily be liable. Hence one must start from him. Consequently, in the case of unlawful acts, it is possible only in the second instance that the principal in the background should also be liable. Here the will of the parties is not involved; for duties to make compensation operate without reference to their intention. On the other hand, the contrary is true in construing legal transactions. Here a third party can always decide in his discretion, whether he prefers to have the principal as his counterparty, instead of the one contracting with him, insofar as this also accords with the intention of the party acting and of the principal. In the case of agency, the variety of systematic factors always permits the intermediary to be ignored in favor of the principal. For this reason, the specific characteristic of fully authorized representation is that the results of the acts of the agent are ascribed, not to himself, but only to the party "represented."

Finally also, not considerations of this nature, but historical grounds,[14] have been responsible for the acceptance, expressed in the brocard "*re-*

[14] For more details, my review of the works on agency by Powell, Hanbury, and Ferson in 20 Rabels Zeitschrift (1955) 373.

spondeat superior," of the liability of a master for the torts and crimes of his servant in the law of agency. Concepts grow out of specific typical fact situations, and it is therefore not surprising that the concept of agency developed differently in different times and places. It is well known that in England agency as a representation of will developed out of the imputation of legal transactions in the guardianship relation. Attendant upon the disappearance of guardianship—leaving the father no legal power of representation as in continental law—the ward and the members of the family became independent bearers of rights. Thus they appeared to the outside world through the office of the agent as subjects of rights and property, separate from the head of the household. In this manner, the evolution of the fundamental principle of agency out of the father-son relationship or that between master and servant—starting from England, where historical circumstances played a special role[15]—led to the result that the doctrine of the "liability of a principal, who is exposed to the power of his agent," and the doctrine of *respondeat superior*, were "brought under one head, whereby agency came to be the title in the law knitting together the whole subject of the employment of one man by another."[16]

B. The Factual Components of Representation

1. The Appointment

(a) An Organizational Act

As an institution of the division of labor in the process of the evolution and application of law, extending the radius of the principal's activity, agency pertains to the sphere of *factual organization*. Agency is not a special category of the contractual relationship, but of the transaction concluded. For this reason also, it does not lie on the same plane as the contract for the benefit of third parties, although in England[17] especially, "undisclosed agency" is again and again applied[18] in lieu of the "*contractus in favorem tertii*," not there recognized. But in the case of agency, the "third party" concludes the transaction, while in a contract for the benefit of a third party, the "third party" is affected by the legal conse-

[15] Yet in the United States and in Canada, servants are treated often as one group of agents (other agents being called independent contractors). As a result, the law of master and servant is brought under the classification of the law of agency.

[16] Conard, "What's Wrong with Agency?" 1 J. Legal Ed. (1940) 548.

[17] Denning, L. J., in Smith v. River Douglas Catchment Board [1949] 2 All E. R. 188 and Devlin, J. in Pyrene Co. v. Scindia Navigation Co. [1954] 2 All E. R. 165. See also Keighley, Maxsted & Co. v. Durant, [1901] A. C. 240.

[18] In the continental legal development, agency, like contract for the benefit of third parties, was included in the Roman prohibition "alteri cavere." D. 50.17.73.

quences. In the case of agency, the third party disappears "as a scaffolding which has become useless after the construction of the building,"[19] whereas in the case of the contract for the benefit of a third party, the third party remains the focus of construction.

From this systematic classification, the conditions of agency are to be developed. The first postulate for this as for any legally effective relationship must be the competence of the party acting. His competence is the formal basis, the conditioning element, on which the substantive transaction of the agent as the logically—not chronologically—conditioned element is predicated. In this sense, the first place among the factual components of agency is occupied by the authorization of the agent, his attribution of competence.

This organizational nature of the appointment, placing it in the complex of norms which comprehend the presuppositions for the creation of law in fact, but which in itself does not produce full substantive law, is of course even today not always set forth with the necessary clarity. Thus, it is precisely a distinguishing mark of the Code Napoléon and, following its model, of the laws of Spain, Portugal, Rumania, Brazil, and other South American countries, that they do not recognize agency as such. They conceive it as only a subordinate instance or "external effect" of mandate. On the one hand, "mandate" is characterized by these laws as a contract, which contains the rights and duties of the parties (Art. 1984, II, Art. 1991, 1998 c). On the other hand, the law provides (Art. 1984, I): "*Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom.*"[20]

This confusion of the external authorization of the agent to act with the internal liabilities and rights of the principal concerned, leads to the result that the necessary requirements for both are not satisfactorily distinguished.[21] But it is only a presupposition of the "contract of agency," that the agent accepts designation by the principal. On the other hand, the appointment, like the offer of a contract, establishes competence and as such is a unilateral act of its author.[22] The Anglo-American laws,[23] it

[19] Tarrible, Rapport au Tribunal-Fenet, 14, 595.

[20] Survey in Demogue, 1 Traité des obligations en général (1922) 245–7. Nr. 151 bis.

[21] Thus in international private law, this amalgamation of the grant of authority and mandate has a result that the law which governs the contract of mandate also prescribes how far an authority reaches, to what requirements of form the authorization is subject, etc. (Wahl in Baudry-Lacantinerie et Saignat 266 n. I ,500.); Fedozzi, Il diritto internazionale privato, Teorie generali e diritto civile (Padova, 1935) 740; further references in 3 Rabel, Conflict of Laws (1950) 123.

[22] Lewis, J. in Sinfra AG v. Sinfra, Ltd. [1939] 2 All E. R. 682 "A power of attorney is not a contract. It is a one-sided instrument." American Restatement of Agency, §§15 ff.

[23] This is also true of the Scandinavian laws. In Denmark, as early as 1835, Örstedt in his

is true, do not follow this combination of appointment on the one hand with right and liability on the other. They exhibit no connection whatever with the classical concept of mandate, which is unknown in English law. But here also, a clear understanding of the different elements contained in this threefold relationship and of what various questions relative thereto must at times be resolved, despite the efforts of Hohfeld[24] is still not completely attained.[25]

In contrast, the German Civil Code most sharply separates the authority from the underlying agreement to act, following the doctrine of "abstract authority" developed by Ihering[26] and Laband[27] in the middle of the 19th century. Indeed, Ihering and Laband with unparalleled success convinced the scientific world that voluntary representation rests upon the "authority," which in no event may be regarded as the internal aspect of an appointment as agent, but that appointment and authority are "two inherently different relationships," which only in fact frequently overlap.

Accordingly, the German Civil Code provides for agency in the General Part (§§164 ff.), while it treats the basic relationship in the Special Part of the Law of Obligations. In principle, abandoning their previous position, this is followed by the subsequent codifications of Japan,[28] Switzer-

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handbook on Danish and Norwegian legislation distinguishes the agency contract from the authorization; nevertheless, the clear separation of the two was first established through the influence of Laband's doctrine.

[24] Hohfeld, Fundamental Legal Conceptions and other Legal Essays. (ed. by W. Wheeler Cook, 1923) 50–60; and following him Seavey, "The Rationale of Agency," 29 Yale L. J. (1919) 859–95; American Restatement of Agency §12.

[25] Thus Pollock (On contracts, 13th ed., 46) characterizes the relation of principal and agent as a special kind of contract. Similarly, Halsbury (1 Laws of England (3rd ed. by Lord Simons, 1952) §350, p. 145) requires for the existence of agency "that the agent consents so to act." Powell, The Law of Agency (1952) 33 confines "the term 'authority' . . . to the matters which the principal has *agreed* with the agent that the agent may conduct on his behalf . . ." and chooses the term "contractual agency" in his last article on this subject in Butterworths South African Law Review 1956, 41. Yet the construction also appears that not every agency is a contract, that it is more decisive that the agent be invested with a legal power. Thus Seavey (*ibid*, 863) characterizes authority as "the result of power by the principal"; similarly, Salmond and Winfield, Law of Contracts (1927) 340; Ferson, Principles of Agency (Brooklyn, 1954) §136; Dowrick in 17 Modern Law Review (1954) 36 ff.; *cf.* also Mellish, L. J. in Parker v. McKenna (1874) 44 L. J. (Ch.) 425. Wright G. in Lamb & Sons v. Goring Brick Co., Ltd. [1932] 1 K.B. 710.

[26] His Jahrbuch II (1858) 131.

[27] 10 Zeitschrift für Handelsrecht (1866) 183 ff., 208.

[28] Sections 99 ff., Japanese Civil Code.

land,[29] Sweden,[30] Denmark,[31] Norway,[32] Finland,[33] Poland,[34] Formosa,[35] Italy,[36] Greece,[37] and Czechoslovakia,[38] although in diluted form. Thus, the Swiss law separates the authority from the basic relationship but regulates the appointment also in the Law of Obligations, in order to avoid prejudicing the question whether and how far the rules in question are applicable outside of contractual obligations. The distinction in the Chinese Civil Code of 1929, still today in effect in Formosa, goes still further. Despite its fundamental affinity with the German Civil Code, it first gives provisions on "agency" in the General Part (§§103 ff.), then it introduces dispositions concerning the "authorization" in the General Part of the Law of Obligations (§§167 ff.), and, finally, regulates the appointment in the Special Part of the Law of Obligations (§§528 ff.).

(b) An Objective, Externally Oriented Act

Like every organizational act, appointment of an agent falls into three parts: first, it designates the individual person who shall have competence; second, it defines such competence by limiting the transactions to be undertaken; third, it confers upon the person concerned authority to undertake such transactions for another, a third party.

If the definition of competence is not established by an express declaration, or indeed in a document, then it is to be perceived only in connection with the entire legal relationship in which the participating parties stand. Here too, the underlying relationship, even recognizing the "abstract" nature of the authority, still affects it. The consequence of this is that the power of representation often acquires *typical* content and extent, corresponding to the customary practice as to the scope of agency in particular professional occupations. In case of doubt, an authority

[29] Art. 32 ff. OR.

[30] §§10 ff. of the Law of 11.6.1915 on contracts and other transactions relating to property, in contrast to Chapter 18 of the part on commerce and obligations of the General Code of 1734.

[31] §§10 ff. of the Law on Contracts and Other Legal Transactions relating to the law of property, of 8.5.1917.

[32] Sections 10 ff. of the Law concerning conclusion of contracts, authority, and unlawful declarations, of 31.5.1918.

[33] §§10 ff. of the Law concerning legal transactions in the sphere of property, of 13.6.1929.

[34] Art 93 ff. of the Decree of 27.10.1933, "The Code of Obligations"; No. 18 of the laws and decrees of Poland.

[35] §§103 ff., 167 ff. of the Civil Code of 1929–1931, originally in effect only in China (Kuomintang), where, however, it was repealed on 29.9.49 by Art. 3 of the "general program of the political assembly." It still has been in effect in Formosa since 1945.

[36] Arts. 1387–1400 Codice Civile.

[37] §§211 ff. ZGB of 1940.

[38] §§56 ff. of the Civil Code of the Czechoslovakian Republic of 25.10.1950.

granted for a defined purpose extends to all transactions which are normally necessary for the accomplishment of such purpose,[39] or may be regarded as appropriate under the circumstances, but only for these. Thus fundamentally, an agent who carries on a particular kind of trade, business, or profession as agent, has authority to do whatever is usual in the ordinary course of that trade, business, or profession.[40] He has authority to act in accordance with such customs or usages as govern the particular transaction and are generally recognized—unless the principal in conferring authority has expressed something different.

In addition, it is relevant whether there is a universal, general, or special agent. In principle, a universal agent can undertake all but highly personal transactions; a general agent, like the factor, broker, or partner, is an agent for specific types of transactions and thus can enter into transactions which his position customarily includes; finally, a special agent has competence only as defined by more specific instructions. However, along with these types of clerks, mercantile, commission, or *del credere* agents, of factors, brokers, auctioneers, etc., attendant circumstances, like the size of the business involved, the specific position of one appointed, also play a part. Yet an uncongenial, rigid application of the fiction of implied authority restricted to the scope of the employment[41] should be avoided. The social and economic relations in the concrete individual case must never be left out of sight.

This objective trait of the appointment also becomes apparent in its creation. The competence of the agent for the principal is as such binding on third parties. Fundamentally, therefore, it should be subject to change or recall only in the manner in which it was established. Its author has declared himself objectively thereby. He is estopped to deny the authority. This feature of the grant of authority corresponds with its dual outlook—to the agent and to the third party. The third party has to know whether he is contracting with A on his own account or as the representative of B. The agent has to know whether he or B is accountable for the transaction. Consequently, both the third party and A are entitled to have knowledge of the appointment.

In Germany, where the question of the effect of the appointment gave

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[39] To this effect also the preliminary draft of a uniform Law of Agency contains the rule of interpretation: "In the case of authorization implied from a position, the agent shall be authorized to perform in the name of his principal all those acts normally implied by his position. If a person shall be entrusted by another with the management of a business, then by that fact he shall be authorized to perform all acts required by the normal running of the business."

[40] Coles v. Bristowe (1868) 4 Ch. App. 3; Robinson v. Mollett (1875) L.R. 7 H.L. 802.

[41] Excellently, Laski, The Foundations of Sovereignty (New York, 1921) 250-29.

rise to a great theoretical dispute, quite in the manner of the 19th century, §167 BGB alternatively allows notice of the authority to the agent *or* to the third party. This however involves, contrary to what these theories suppose, a practical decision on the grounds of expediency, for which the legislature is entirely competent, and which is to be made according to the various interests concerned. It is quite analogous to the question of the effect of a declaration of will, on which decisions of policy also have been garbed in the timeless, absolute apparel of the declaration, communication, reception, or reliance theories.

English and American law associates with this question the distinction between "real" and "apparent" authority.[42] "Real" designates an appointment which is effective against the agent, while an appointment is "apparent" which applies as against a third party.[43] This contrast derives from the conceptually realistic premise of legal "appearance," which corresponds to causal explanations but has nothing to do with considerations of value. The competence of the agent is in no case "apparent" in the sense of being illusory, but in both cases it is equally effective and the foundation for that power—viz., the principal's consent—may be as real in one case as it is in the other.[44] Hence apparent authority also can nowise be founded upon the doctrine of authority. It is true that just here the conception of estoppel often plays a decisive role, since the third party in his reliance upon an external fact of "holding out" merits protection. But this need not be the case. As against third parties, the appointment can at any time also rest upon the intention declared therein. Therefore, in the case of apparent authority, it must be distinguished whether it rests upon the intention of the principal or in the *representation* by him that he has consented.

Between these two sources, the decisive line of division runs. For the meaning of the power of representation as "competence" rests not only in the fact that it attributes to the agent "legal power" in relation to the principal, in the sense that the law validates his normative behavior. His behavior rather must be justified also in relation to the principal from the viewpoint of what is not unlawful. Alongside of the legal power of the agent "looking out" (*posse*), the relevance of his privilege "looking in," the lawfulness of his conduct (*licere*) must be considered. Accordingly, an authority is real, where power and privilege to exert the power are co-

[42] On the other hand for German law, Endemann, 1 Lehrbuch des Bürgerl. Rechts (1903) §81 sub 3, characterizes a grant of a power of attorney of this nature as "not genuine."

[43] This is also the "doctrine of legal appearances" in German law. *Cf.* Wellspacher, Das Vertrauen auf äussere Tatbestände (1906) 95 ff.; H. Krause, Schweigen im Rechtsverkehr (1933) 138 ff.

[44] Seavey, Studies in Agency (1949) 184.

extensive as against the principal. However, a power of representation, based only on the idea of estoppel, lacks this criterion of lawfulness. This is the case when as often happens, to cope with unforeseen conditions, an agent's effective powers in dealing with outsiders are extended to transactions which he is under a duty to his principal not to enter into.

Obviously, the point of view implicit in emphasis upon "can" at the expense of "may" as respects the agent, reflects natural science thinking. For one who regards only the power of the agent derives it in a genetic perspective entirely from the legal element of change, without considering the justifying element of value inherent in what is axiologically permissible. It looks only to what is possible in order to satisfy the need for causality. This is quite in the line of the tendency to give agency a technical construction, to which the principle of abstraction also points. For this reason, Laband's[45] doctrine also suffers from the defect that it does not satisfactorily distinguish between an authority that the law makes dependent upon the voluntary declaration of the principal, and one implied by law with reference to a third party under the doctrine of estoppel.

2. The Act of the Agent

(a) No Necessary "Acting in the Name of Another"

This one-sided accent on the "power" of the agent, however, is not the only defect of Laband's teaching. As a correct idea easily may be carried to extremes, this also led in still another connection beyond its purpose, namely, that by emphasizing in the authority the activity of the agent as the postulate of all forms of agency, its adherents stressed too strongly the necessity of disclosure of the agent's acting in another's name. For they placed acts under an authority and acts in another's name on the same basis. With this requirement of the "*contemplatio domini*," they encountered the even then prevailing doctrine in continental law of the "declaration" theory, according to which only the intent "declared" in a legal transaction deserves consideration. Accordingly, there can be agency only when the contracting party openly acted in another's name. The result of this is that the conception of agency in continental law is in fact narrowly restricted.

Support for this conclusion as respects the effect of agency, taken in connection with acting in another's name, is at the same time drawn from the law. Thus, the prevailing view in France infers from Article 1984 Code Civil, according to which agency is the act of the agent "*pour le mandant*

[45] 10 Zeitschrift für Handelsrecht, (1866) 183, 231.

et en son nom,"[46] the negative conclusion that in case an agent does not act in another's name, the effects concern only the agent himself. The principal has nothing to do with the transaction. Accordingly, the agent's acting in another's name is also characterized as an "essential element" of agency.[47] The German BGB carries this idea to its last conclusion. It is expressly provided in §164 BGB, that "an agent alone acquires rights and is exclusively personally liable, who acts without disclosing the fact that he is acting as agent."

But the outward appearance of the agent's acts vis-à-vis the third party is not the only matter to be taken into account—in considering the controlling interests. The agent's conduct and the knowledge and the intentions of the third party are not the only bases of the contract. There are also good reasons for applying at least some agency rules based on the facts that the transaction is legally destined for the principal and the agent has been authorized by the principal. The principal has consented to be bound and has manifested that consent to the agent.

In many cases, it is typically immaterial to the third party, in whose interest above all is disclosure material, with whom he contracts. There are numerous transactions, in which it is, so to say, not worth the trouble to make special declarations on whether the acting party is to treat for himself or for someone else and, if so, for whom. According to the statutory rule of §164 BGB, here the intermediary himself had to be involved in the transaction. He had to acquire the rights against and to incur liabilities towards the third party. But in fact it is more appropriate that the principal who provides the means should be a party to the contract. Thus, by teleological justification, direct effects of agency, even without possible notice of agency, have been admitted in German law. In the case of the cash transactions of daily life,[48] the German literature and judicial decisions[49] assimilate acts in the name of another person to acts on behalf of whom it may concern (partially disclosed principal). According to this doctrine of "whom the matter concerns," the legal effects of a bargain in a cash sale directly affect the principal who supplies the money, although the agent has not mentioned that he is an agent for him

[46] B. Starck in Hamel, Le contrat de commission, (Paris 1949) 149: "La quasi-unanimité de la doctrine affirme, que le commissionaire agissant proprio nomine est seul partie au contrat." To the same effect, R. Popesco-Ramniceano, De la représentation dans les actes juridiques (Thèse Paris, 1927) 246 ff.

[47] Madray, De la représentation en droit privé (Thèse Bordeaux, 1931) 165.

[48] E. J. Cohn, Das rechtsgeschäftliche Handeln für denjenigen, den es angeht (1931); v. Lübtow, 112 Ztschr. f. d. gesamte Handelsrecht (1948) 227 ff.

[49] OLG Celle, Blätter f. Nierders. Rechtspflege 1950, 121; OLG Stuttgart, Neue Juristische Wochenschrift 1950, 446.

or has left open the question of who will be the party to the contract, providing that the third party has no special interest in establishing a relationship with the agent. But German law retains, like French law, the principle that the third party has only one debtor and has no right of election between the agent acting at the same time for himself and for a principal.

The distinction between this narrow concept of representation in continental law and the wider concept of agency in Anglo-American law, which also includes the case where the agent does not even disclose that he is acting as an agent, is one of the most important contrasts between the two legal systems that to the present time exist in the sphere of private law.[50] It is a fundamental principle of the Anglo-American law of agency that an undisclosed principal may sue and be sued on a contract made by an agent with a third party, provided that the agent has authority to make the contract. Hence, it is a most decisive turn in the decisions of the Supreme Court of Louisiana that it recently declared the words "in his name" of the local article 2985 CC, corresponding to article 1984 of the French Civil Code, as "not essential," "so as to abandon the civil-law definition and to adopt the common-law concept of power of attorney, covering the cases of undisclosed agency."[51] For the starting point of the common law is undisclosed agency,[52] quite contrary to the civil law, which is premised on open acting, i.e., disclosed agency. Indeed, the common law applies also to undisclosed acts of an authorized agent fundamental principles of agency, unless consideration of third parties unaware of the principal in the background requires their application. The third person shall not be made worse off by the appearance of the principal. In any event, both legal systems today, in the practical end result, often come to very similar conclusions. For each makes a series of concessions to the opposed viewpoint. But the difference still remains in principle, so that what is for one the rule forms the exception for the other.

Finally, this distinction is connected with the different concepts of contract in civil and common law.[53] The English contract developed out

[50] For details see my exposition of "Comparative aspects of undisclosed agency," 18 Modern Law Review (1955) 33 ff.

[51] See Sentell v. Richardson (1947) 211 La. 288, 29 So (2d) 852; Jones, Note 7 La. L. Rev. (1948) 409.

[52] Opposing this "anomaly" Pollock in 3 Law Quarterly Review (1887) 359 and Ames in 18 Yale L. J. (1909) 447: "Why . . . did the English and American Courts sanction a doctrine logically indefensible, and not recognized in other countries?"

[53] For details see my paper "The Undisclosed Principal," 16 Modern Law Review (1953) 299.

of the old contractual remedies. On the other hand, contract in the civil law seeks so far as possible to realize the pure principle of consent. According to this, the parties are bound by the *vinculum iuris*, since and insofar as this corresponds to their declarations of intention. More than this consensus in continental law fundamentally is not necessary.[54] On the other hand, according to the common law, the presence of a "consideration" also forms part of a valid contractual engagement. Now while this requirement on the one hand is opposed to allowing contracts for the benefit of third parties—in which the common law shows that in case of disparity between the principles of consent and consideration it prefers the principle of consideration—on the other hand, it leads to undisclosed agency. For in the case of undisclosed agency, the counterperformance by the undisclosed principal goes to the third party. Here the completion of the counterperformance is the specific element which binds the principal and the third party,[55] irrespective of the failure of the agent to declare that he is acting as an agent.

(b) Acts of Agents and "Self-Acts" in the System of Private Law

As private law is the realm of the law of self-determination by members of the legal community with reference to their reciprocal relations, fundamentally it has place only for undertakings for oneself. Yet here owing to the natural coincidence of individual interests, the responsible decision of each participant for himself indirectly must guarantee the correctness of legal effects. For this reason, there is no other alternative than to integrate the acts of agents in private law directly with the mechanics of self-determination. This occurs through appointment by the principal. The appointment therefore constitutes together with the agent's act the composite legal transaction, which in case the party himself contracts is accomplished by a single act. The consequence is that it is always necessary to consider in each case to what extent the rules of legal transactions designed for acts by oneself also are appropriate to situations in part involving transactions by an agent affecting another person.

In this disputed territory lies the generally accepted rule that the limited capacity of the acting party in the event of transactions by an agent as contrasted with transactions by the party himself is of no conse-

[54] *Cf.* however, the present Art. 1174 Italian Cod. Civ. which still requires a lawful interest of the contracting party which the obligation serves.

[55] Correspondingly, on the other hand, no consideration is necessary to establish the principal-agent relationship.

quence.[56] For the effects of transactions by a minor agent do not prejudice the minor himself, and thus from the viewpoint of the protection of the minor there can be here no objection to such independent activity.[57]

However, by providing that no prejudicial consequences affect the minor, the problem is still not resolved. For indeed it still must be explained why a person with limited capacity, who can enter into transactions only if they are not "dangerous," in contrast thereto should be able as agent to enter into the most burdensome transactions, conceivably involving the greatest disadvantages for the principal. On this the reference to "foreign effects" really says nothing. Further aid can be provided here only by the consideration that the principal himself has selected the minor as agent through the appointment. Therefore, he must ascribe to himself the disadvantages which result from this unfavorable situation.

This explanation obviously is not satisfactory for "legal representation," in case "only" the statute and not the principal appoints the agent. Also in the case of voluntary agency, it can at most apply to the extent that the principal himself possesses full contractual capacity for the particular transaction. Only if in his own person he possesses legal capacity to conclude the transaction in question, can he be allowed to decide whether another person should be chosen for the conclusion of such transaction. Aside from this in the case of voluntary agency, however, there is always still the question whether the decision what should be the age limits for an agent really should be left by the law only to the discretion of an individual person. In various respects, it is still more difficult to conclude a transaction for another than for oneself. To this extent, in considering the limits which the individual contractual capacity of the principal imposes upon the selection of agents by him, it is logical to inquire whether still further precautionary rules should be provided, especially for the agent. With this in view, Spain and certain South American states require, at least in the absence of reference to specific

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[56] Argentina Art. 1898–1900 C.C.; Brazil Art. 1298 C.C.; Chile Art. 2128 C.C.; France Art. 1990 C.C.; Italy Art. 1389 C.C.; Japan §102 C.C.; Germany §165 C.C.; Poland Art. 97 Law of Obligations; USA §21 of the Restatement of Agency.

[57] Colin-Capitant, 1 Cours élémentaire de droit civil français (11th ed. 1947) No. 103; Becker, 6 Kommentar zum Schweizer. Oblig. Recht (2nd ed. 1941) Art. 32 OR Anm. 4; Staudinger-Coing, Kommentar z. BGB §165. 1 Halsbury's Laws of England (3rd ed.) 358. De Villiers and Macintosh, The Law of Agency in South Africa (2nd ed.) p. 26. To the same effect, also Art. 6 of the Preliminary Draft of a uniform Law on Agency "in order that the act of the agent bind the principal and the third party, it shall suffice that the agent possess sufficient understanding to accomplish such an act, even though he may not have the legal capacity to carry out the act in his own name."

transactions, that in any event a general representative[58] for the purposes of commercial law should always have unlimited capacity.[59]

Another example is presented by the question of the incidence of requirements of form. This is not resolved by the simple assumption that a transaction by an agent should be subject to the same rules as other legal transactions. For this again would pass over its character as a partial legal transaction and the related peculiarity that the transaction of the agent is entered into not for himself but for another person. In consequence, it must be inquired at times in the light of the purpose of the particular formal requirement whether from this viewpoint the fact that the transaction is for oneself or for another is or is not significant. If this plays no role in the situation, then the application of the formal requirement only to the transaction of the agent is unobjectionable. Otherwise, however, it follows that the appointment should be subject either in addition or alone to the requirement of form. For in such case the need of form concerns either cumulatively or solely the portion of the transaction, which the appointment constitutes.

This connection naturally will be overlooked by those who with §167 of the German BGB generally declare: "The declaration of authority does not require the form prescribed for the legal transaction to which the authority relates."[60] This implicitly places transactions on one's own

[58] The value of the distinction between general and special agents is disputed. The German Civil Code does not recognize it. In contrast with the older German law (Preuss. Allgemeines Landrecht 13 I, 118; Sächs. BGB §§1296) and most foreign laws (Art. 1988 French C.C.; Art. 396 Swiss OR; Art. 311 III Italian C.C.; Art. 1295 Brazilian C.C., etc.), it contains no special provisions to protect the person who grants an authority against the risk in the grant of a general authority to the agent of his "going too far." Also in American literature, the distinction has been rejected as "meaningless and confusing" (Tiffany, On Agency [2nd ed. by Powell] 50–51). However, there remains a distinction, if not of a fundamental character, yet one "in kind."

[59] Spain C.Com. Art. 282; Mexico C.Com. Art. 310; Chile C.Com. Art 338. According to Art. 132 of the Argentine C.Com. the general agent must have capacity to undertake commercial transactions on his own behalf. These special provisions have been overlooked in the Art. "Procura," 5 Rechtsvergl. Handwörterbuch, (1936) 671 by Würdinger.

[60] On the other hand, the appointment is subjected in principle to the formal requirements for legal transactions in France (see Colin-Capitant, 1 Cours élémentaire de droit civil français [11th ed. 1947] No. 103); Italy Art. 1392 C.C.; Greece Art. 217 C.C.; Poland Art. 96 §2 Law of Obligations; Portugal Art 1319 ff. C.C.; Albania Art. 1108 C.C.; Siam Art. 789 C.C. In England and the United States: "An agent to execute a deed, must himself be appointed by deed" (Steiglitz v. Egginton 1815—Holt (N.P.) 141 as well as Restatement of Agency §§26 ff.) *Cf.* also §§52–54 Law of Property Act, 1925, earlier §§1–3 Statute of Frauds, 29 Ch. 2, C. 3. On the other hand, Brazil and Argentina (Art. 1004 and 1941 Civil Code) have a compromise solution. They do not, it is true, allow the authorization for a transaction requiring form to be free from form. But they do not insist upon the same requirements of form for the authorization and the transaction entered into by the agent. Instead, they are satisfied to require a written form for an authorization to enter into such legal transactions for which a public or a private document is necessary.

behalf and through an agent generally on the same basis, without considering the question whether distinction should be made according to the reason for the formal requirement. Now not to allow the simple avoidance of some formal requirement by concluding transactions through an agent, the German judicial decisions[61] were constrained, for example, to subject, despite §167, self-serving authorities for the sale of land or the authority of a joint heir for the transfer of an inheritance to the formal requirements of §§313, 2033 for transactions by the party concerned.

Along with this requirement of form based upon the relation between the grant of an authority and the individual transaction by an agent, there also appears the need for form which quite generally is due to the risk for the principal of the agent's activity. Here the risk of the concrete transaction does not play the leading role, but the exposure of interests attending the grant of an authority and the possibility thereby created for another person to enter into engagements for the principal. This exposure of interests will be the greater the more widely the scope of authority is drawn. For this reason, Poland requires that the grant of a general authority must always be in writing.[61a] Other legal systems have at least special formal requirements for general powers of attorney in the commercial law. For these they always require writing[62] or express appointment[63] or registration, as well as publication,[64] and prescribe that a restriction on the established scope of a general authority is not effective against third parties.[65]

3. Appointment and Act of Agent—A Composite Legal Act

One who would legislate, like one who seeks to interpret, must know the structure of the legal system in order to understand how he is to proceed. For knowledge of the logical formation of a legal system alone

[61] RG 50, 168; 104, 237; 110, 320; BGH Deutsche Notarzeitschrift 52, 477.

[61a] Art. 96, §1 of the Polish Law of Obligations of 10.27.1933.

[62] Argentine Art. 133 Commercial Code; Chile Art. 339 Commercial Code; Finland Commercial Code §25; Sweden Commercial Code §25.

[63] §48 German Commercial Code; Art. 48 Australian Commercial Code; Art. 249 Portuguese Commercial Code; Art. 41 Czechoslovakian Commercial Code.

[64] Bolivia Art. 74 Commercial Code; Brazil Art. 74 Commercial Code; Bulgaria Art. 49, 50 Commercial Code; France Art. 4 and 11 of the Law of 19.3.1919; Finland §310 Commercial Code; Sweden §31, Commercial Code; Japan Art. 31 Commercial Code.

[65] With this in view, Art. 7 of the Preliminary draft of a uniform Law on Agency in international relations of the Rome Institute (1955) asserts the self-explanatory rule: "If, in the case of a general authorization, the law of the country where the agent must carry out the acts for which he has received authorization requires that authorization be registered or published in some specified form, then the law shall determine the acts the agent is authorized to carry out."

reveals what distinctions are to be made and their rank of priority.[66] Obviously, this does not yet disclose what in particular should be right. This at times can be reached only through evaluation of the various interests. Thus, the questions in issue follow the logical framework of the legal system, while the solutions are determined by the idea of justice.

Accordingly, in the treatment of agency, its place in the system of private law must first be clarified. It is a corollary of the freedom of the individual for private self-determination. This fundamental principle must first be positively defined; then follows the further question: Should each legal subject be able to deal on his own behalf only in his own person, or should it also be possible for him to delegate his power of decision within narrower or wider limits to another? If then agency is allowed, the principal acquires the possibility of *indirect exercise of his capacities through the agent.*

This combination of authorization and act of the agent in a legal transaction alone makes clear that in general agency may be combined in private law as the law of intelligent self-determination.[67] Consequently, from this standpoint alone can the practical questions that involve comparison with the grouping of interests in case of one's own conduct, be correctly put. Through the grant of authority, the determination by another necessarily present in any agency, is integrated in the sphere of private autonomy as a form of mediate self-determination. Thus, appointment and act of agent together form a unity: the legal act of the parties as a whole; (*acte juridique, negozio giuridico, Rechtsgeschäft*). And indeed they together present a time-bound factual situation, just as offer and acceptance in chronological sequence constitute the composite legal act, the "contract."

As in the case of contract, judgment must derive from the entire transaction, even though, for example, there is a lack of intention in the particular declaration of the parties. Thus too, the solution of specific questions is to be found in the unity formed by the authorization and the act of the agent. In this sense, for example, the possibility of a suit on account of error is not to be determined separately and independently of the authorization and the act of the agent, but as regarded in view of the legal act as a whole. Accordingly, in case of mental reservation, lack of knowledge on the part of the agent is not material if only the third party was apprized. On the question whose knowledge of relevant circum-

[66] According to Willoughby, The Fundamental Concepts of Public Law (1931) 10, these functions of methodology belong to "analytical or juristic political philosophy."

[67] My Vertretung beim Rechtsgeschäft (Tübingen, 1955) 190 ff.

stances, or whose lack of intention should be decisive, it is of concern who at the time importantly influenced the *conclusion* of the transaction as a whole, viz., who is responsible therefor. The position taken by the German BGB (§166 BGB) and followed by the Japanese (§101) and the Greek (Art. 214) Civil Codes, that knowledge of the person represented is relevant only in case the agent has acted in accordance with "his precise instructions," is too narrow. On the other hand, the statement of Lord Abinger[68] goes too far: "The knowledge of the principal is the knowledge of the agent and the knowledge of the agent the knowledge of the principal." Rather should the knowledge of the principal be considered "if he intended the agent to make it or, without intending it to be made, created an unreasonable risk that it would."[69] In case of an innocent division of ingredients, it is really untenable to argue with Slesser, L. J.: "The agent and the principal are in law one for the purpose of acts which make up the fraudulent misrepresentation,"[70] and so "add innocent knowledge to innocent knowledge and get guilty knowledge."[71] But the possibility remains that perhaps negligent silence of the principal should be deemed *culpa in contrahendo*. For through the intentional grant of authority, which forms a part of the entire legal transaction, he has also himself participated in the transaction with the third party.[72]

Instead of announcing single solutions, the type of transaction and the corresponding *ratio legis* should be considered in evaluating the participation of the principal. The question involved is why this or some other provision emphasizes specific knowledge or constructive knowledge on the part of a person; thus in the case of provisions concerning form, the reason for the formal requirement (warning to the parties or security of proof) is decisive. Further, it is possible, as in the case of "contracts *uberrimae fidei*," that a special duty to speak and to set forth the relations contemplated is incumbent on the parties.[73] This also imports higher demands to consider the knowledge of the principal and the agent, respectively.

From the point of view of the unity of the legal act, the effect of changes in the principal after grant of authority before conclusion of the transaction by the agent also is to be defined. What are the effects of the

[68] Cornfoot v. Fowke (1840) 6 M. & W. 358.

[69] See the opinion of Lord Atkinson in Pearson & Son, Ltd. v. Dublin Corporation, [1907] A. C. 351, 363.

[70] London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property and Investment Co., Ltd., [1936] All. E.R. at 1047.

[71] Devlin in 53 Law Quarterly Review (1937) 362.

[72] *Cf.* Gower, 1 Modern Law Review (1937) 149; Unger, 15 Modern Law Review (1952) 235.

[73] Anson. Principles of the English Law of Contract (20th ed. 1952) 179.

former's death, loss of capacity, or becoming bankrupt, should not be "logically" for all purposes decided by the argument that an agent "can" not exceed what at such instant his principal himself can do.[74] This argument already misses the mark, inasmuch as it does not consider the lack of knowledge of the third party. It misconceives the whole problem. A solution is attainable only in terms of evaluation of the interests of the persons who share in the legal act later entered into through the agency. In the case of a contract also, the death of the offeror after communication of the offer does not render conclusion of the contract conceptually impossible. Or reference may be made to the discrepancy between the true intention of the principal and the ensuing legal consequences, arising from the significance of the declared intention of the principal. Thus also, the decision whether the incompetence or the death of the principal does not terminate the authority[75] at all, or does so automatically,[76] or only after knowledge by the intermediate party or (and) third[77] parties, depends upon whether more weight should be given to the needs of the parties, namely the agent, or to the personal relationship relied upon.

Here it is decisive to consider also the principles of policy on what is correct, controlling for the time being the sphere of the principal's prospective activity. In the case of representation in a marriage contract under Canon Law (*cf.* C. 1089, §3) on account of the strict principle of consent prevailing in this matter, necessitated by the sacramental nature of marriage, other principles control than, for example, in the conclusion of commercial transactions through an agent. Further, the current private law trend, for example, with respect to the effects of bankruptcy, is pertinent, etc.

Finally, the various possibilities in the attribution of interests in the authority are to be considered. These move in a sliding scale from authority lying exclusively in the interest of the principal to the *procuratio*

[74] Thus Powell, The Law of Agency (London 1952) 310: "Logically, the conception of authority demands a continuing consent of the principal to the agent's acts on his behalf. If therefore the principle dies, the consent is unable to continue because the mind from which it issued has ceased to operate."

[75] §52 of the German, Art. 290 of the Spanish, Art. 144 of the Argentinian Commercial Codes, as well as Art. 21 of the Scandinavian Law on Authority. For the irrevocable power of authority coupled with an interest (*cf.* Swisher v. Orrison Cigar Co., 122 Ohio St. 195, 171 N.E. 92 (1930).

[76] England, Mitchelly v. Eades (1700) Prec. Ch. 125; Wallace v. Cook (1804) 5 Esp. 117, and the United States Majority Rule; see Restatement, Agency, §120 (1933); Russia, Art. 200 C.C.; Austria §1022 ABGB.

[77] Minority Rule in the United States; see Report N.Y. Law Revision Commission 1939, 715 and cases collected in 67 A.L.R. (1930) 1419. In addition, Restatement §§127–129. Further Spain, Art. 1738 C.C.; France, Art. 2008–9 C.C.; Switzerland Art. 37 OR, etc.

in rem suam[78] granted exclusively in the interest of the agent or the third party. This is accompanied by a fundamental shift in the function of the authorization. In the exceptional case of "authority coupled with an interest," the evaluation embodied in the authorization already approximates the displacement of value resulting from the completed transaction. Here the principle of "vested rights" fundamentally argues for independence of the authority from events occurring after it is granted.[79] Moreover, such "authority coupled with an interest" is usually irrevocable,[80] and hence likewise the demand for acquiescence in the effects of agency is abandoned by the principal. An exceptional case, this requires separate treatment, which thus forms further indication of the necessary multiplicity of the law of agency.

C. Efforts Looking to International Unification of the Law of Agency

Not only does the theoretical possibility of agency thus assume complicated considerations, but also, above all, its practical accomplishment often requires differentiated regulation according to the various opposing interests concerned. First, the factual complex including appointment and act of agent, must be subordinated to the purposes of provisions applicable to individual types of transactions. Thus, analysis of the act of the parties, normally accomplished in a single act, compels consideration of the factual component to which the purpose of a norm at times relates. On the other hand, difficulties arise from the special problem of transactions not concluded by oneself. These reach from the exclusion of transactions only performable in person to the precautions to be prescribed in the interest of the principal in allowing undertaking by another, as well as the necessary requirement of disclosure in the interest of third parties. This again is connected with the need to protect the confidence of the third party relying upon the external fact of appointment.

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[78] The "authority coupled with an interest" is recognized in England (e.g., Crouch v. Martin (1707, Ch.) 2 Vern 595; Walsh v. Whitcomb (1797) 2 Esp N.P.C. 565; Smart v. Sandars, (5 C.B. 895); the United States (Restatement §139, further reference in Mechem Outlines of Agency (4th ed. 1952) §§270 ff.); in Germany (§168 BGB); Italy (Art. 1723 C.C.); Brazil (Art. 1317 ff. C.C.); Argentina (Art. 1979 C.C.), etc.

[79] Thus for England, Sects. 126–7, of the Law of Property Act (1925) and Spooner v. Sandilands (1842) 1 Y. & Coll. Ch. Cas. 390; Bowstead, On Agency (10th ed.) Art. 140; Powell, On Agency, 310. Dissenting Hanbury, Principles of Agency (1952) 86. For the United States, Swisher v. Orrison Cigar Co., 122 Ohio St. 195, 171 N.E. 92 (1930); Seavey, 31 Yale Law Journal 283, 296, with references; Ferson, Principles of Agency (1954) 200.

[80] On this see especially the rich Scandinavian literature, e.g. Björling in Festskrift for Berndt Julius Grotenfelt (Helsingfors 1929) 6; Olsson in Tidskrift Juridiska Föreningen i Finland 88 (1952) 236 ff.

Despite this exceptionally multifaceted problem of the structure of agency, which is not susceptible of solution by a couple of lapidary statutory provisions, it is just in this sphere that efforts are being made towards international unification. For three decades, the Rome Institute for Unification of Private Law has been working on a supranational substantive law of agency. In the years 1946–1950, it drafted an Avant-Projet "d'une Loi uniforme sur la représentation en matière de droit privé patrimonial dans les rapports internationaux." In addition, since 1946, the International Law Association, as well as the Institut de Droit International, have occupied themselves independently of each other with the choice of law aspect of agency. Thus far, the result has been three drafts repeatedly considered by the Assembly (1950, 1951, and 1952) of the International Law Association. Moreover, the Institut de Droit International has published a committee report on the connecting factor in brokerage transactions. Thus, the Institut de Droit International limits itself to indirect agency, while the draft of the Rome Institute concerns itself only with direct agency (Art. 2 §3). On the other hand, the International Law Association includes direct and indirect agency in its works.[81]

Behind these efforts towards unification stands the need to regulate transactions in which persons from various states frequently participate, by uniform rules. For this, the sphere of agency is appropriate insofar as the underlying living conditions in the individual states forming its basis are not too dissimilar. Moreover, national feelings, usages, etc., here do not play a decisive role. Yet as special psychological or technical difficulties arise in detail, the drafts stop short of unification. Thus all the drafts relate only to agency and not to so-called legal representation. Also, they all purport to cover only agency in transactions affecting property. They expressly exclude representation in the sphere of family law, in judicial proceedings by attorneys in law or in fact. Thus, at the same time, they evidence an extension of the drafts concerning the international sale of goods, already going back to long, continued efforts. To this extent, there is a parallel between these and the additional project of the Rome Institute concerning a substantive uniform regulation of contracts concluded between absent parties. Moreover, the Rome draft expressly relates also only to international transactions. (Art. 25.)

This Rome draft is of interest here in the first instance, since it seeks to create *substantive* norms of agency of a supranational character. In any event, in controversial matters, it does not shun mere reference to a choice of law rule. Thus, on the disputed question of the necessity of

[81] *Cf.* also Fr. Cosentini, Code International des Obligations, (Paris 1937).

form for the appointment, it does not take position on the merits, but only declares the generally recognized conflicts rule "that the form of the authorization shall be in accordance with the rules of the country where the agent is to carry out the act." (Art. 3, *cf.* also likewise Art. 7 II and page 181, as well as Art. 4.)

Also, it tends in other cases to avoid controversial questions. Thus, it does not take position even on the central problem whether in all cases and how an agent should disclose his representation of the principal. It leaves the whole problematical matter of undisclosed agency aside. Similarly, it reserves paragraphs for truisms to be found in any modern doctrine of legal acts, such as "authorization may be an express, written or oral declaration by the principal; it may also be implied from circumstances." Thus, even in the initial provision concerning declaration of the authority, it establishes: "it may be implied from the position of the agent." Or it proclaims the never questioned proposition (Art. 10 §2): "If the agent has exceeded the scope of his authorization the principal shall not be bound by the act of the agent."

Above all, it does not create the spirit of Cosentini's: "*Comparer en unifiant et unifier en réformant.*"[82] In reality, it follows rather Demogue's[83] counsel: "*Il ne faut pas exagérer le désir d'unification.*" It holds with Coquoz,[84] "*La cause du droit international s'avère délicate; il faut savoir se limiter, et modestes, se contenter d'un succès partiel.*"

Moreover, it strives to ensure full conformity with the draft of the law of sales. Thus, it follows the draft in affirming application of the law of the buyer, when the agent of a foreign vendor enters into a contract in the country of the buyer (Art. 6). However, the hesitations thus far of the governments to accept the sales law drafts apparently are due just to this overextensive rule.[85] The specific value of the Rome draft on agency therefore must also lie more in the effort to co-ordinate detailed provisions—frequently leaning towards the uniform Scandinavian laws on authority—in the view that they furnish tolerable solutions for all the laws that may come in question. Obviously, it would again have been desirable, instead of another overconscientious compilatory mosaic, to provide a more comprehensive regulation, formed in a single mold and based upon consideration of the relevant policies and interests to oppose a directionless casuistry, the great danger of our time.

[82] Le droit comparé et l'american common law (1931) 7.

[83] L'unification internationale du droit privé (1927) 169.

[84] Le droit privé international aérien (1937) 49.

[85] Criticism in Rabel, 3 The Conflict of Laws (1950) 58 f.; Dölle, 17 Rabels Zeitschrift (1952) 175.

G. R. DELAUME

Jurisdiction of Courts and International Loans

A Study of Lenders' Practice

AN ATTEMPT recently has been made to describe the practice of lenders in regard to stipulations of applicable law in international loans.[1] Lenders also take an interest in the jurisdictional issues connected with their loans. Jurisdictional and conflict of laws problems alike are factors of uncertainty which warrant careful attention before embarking upon international loan transactions. To a large extent, the two types of problems are interdependent and attempts to settle conflict of laws difficulties by stipulations of applicable law might be defeated if no solution were sought to the corresponding jurisdictional issue. So much the more, since the latter issue is frequently paramount to the determination of the applicable law, because of the natural tendency of judges to adjudicate claims under their own law rather than under the law of some foreign country.

Failure to settle the jurisdictional issue may, therefore, subject lenders to the inconvenience and expense of having to litigate their claims in a foreign court, possibly applying a foreign law, adverse to their interests. The occurrence of such a possibility is even more likely because of the many pitfalls set by the leading legal systems of the world in regard to the determination of the international jurisdiction of courts. Quite unexpectedly, lenders in one country may find themselves engaged in litigation in another country merely because they, or their agents, have been successfully served with process[2], or because the borrower or a co-lender

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[1] See Sommers, Broches and Delaume, "Conflict Avoidance in International Loans and Monetary Agreements," 21 Law and Contemporary Problems (Summer 1956), 463.

[2] In civil-law countries, service of process does not confer jurisdiction. This method of acquiring jurisdiction may, therefore, come as a complete surprise to a continental lender served with process in a common-law jurisdiction.

is a national of that particular country[3], or else because the loan contract has been made or is to be performed there[4]. These are merely examples of the many hazards which lenders must seek to avoid if they wish to eliminate the unknown consequences of the jurisdictional risk[5].

One way to solve the difficulty is to stipulate expressly which court shall have jurisdiction over disputes arising out of, or in connection with, the loan contract or the bonds. In the case of loans, as in that of international transactions in general, this method is highly recommended since it prevents future disputes as to the court's jurisdiction at the time adjudication is needed.

The effectiveness of such jurisdictional clauses is, however, subject to important limitations. First, it is a universally accepted doctrine that no one can by agreement extend the jurisdiction of a court over subject matters outside its jurisdiction. All that is permitted is to confer jurisdiction upon such court, having jurisdiction over the subject matter of the dispute, as may be more convenient for the parties. Secondly, while express submissions to a certain court are ordinarily held valid by that

[3] Thus, articles 14 and 15 of the French Civil Code provide, respectively, that French courts have jurisdiction whenever the plaintiff or the defendant, as the case may be, is a French citizen, a jurisdictional ground which may appear somewhat appalling to an American lender. On these provisions of the French law, see Delaume, American-French Private International Law (Col. U. 1953), pp. 56 *et seq.* (hereinafter American-French P.I.L.); the Greek Code of Civil Procedure of 1834 (art. 28) followed the French system. In regard to the present Greek Law, see Ehrenzweig, Fragistas, and Yiamopoulos, American-Greek Private International Law (Col. U. 1957) pp. 29–31 (hereinafter American-Greek P.I.L.).

[4] See, e.g., Order XI, Rule I (e)(i) and (iv) of Rules of the Supreme Court according to which English courts may assume jurisdiction as *forum contractus* when "the contract was made in England," or when "the action is brought in respect of a breach committed in England." Moreover, pursuant to paragraph (iii) of the same Rule, English courts may assume jurisdiction when the contract is "by its terms or by implication to be governed by English law." This extension of the jurisdiction of the English courts is of particular interest in the field of international lending because of the English practice to stipulate in trust deeds or other loan documents that English law shall be the applicable law. Several civil law countries also give jurisdiction to the *forum contractus*. See, e.g., article 420 of the French Civil Code of Procedure; Belgian law of March 25, 1876, article 2, para. 3; German Code of Civil Procedure, article 29. See also, Nussbaum, American-Swiss Private International Law (1951, hereinafter American-Swiss P.I.L.) p. 30; Delaume, American-French P.I.L. p. 58; Philip, American-Danish Private International Law (1957, hereinafter American-Danish P.I.L.) p. 25; Ehrenzweig, Fragistas, and Yiamopoulos, American-Greek P.I.L., pp. 30 and 35.

[5] In the same connection, it is interesting to note that some jurisdictional concepts, such as the doctrine of sovereign immunity, may affect international loans with a particular intensity due to the frequency of governmental borrowing. Conversely other concepts, such as the doing of business by foreign corporations, may have relatively less significance in respect to loans than in regard to other international transactions because the borrowing activities of foreign corporations do not ordinarily present the continuous character required to confer jurisdiction upon the local courts.

particular court, even though it may enjoy a certain amount of discretion in accepting or declining jurisdiction, attempts to oust a court from its jurisdiction have met with varied success in Europe and in the United States. Thus, while such "ousters" of jurisdiction are generally held valid in Europe[6], it has been held on several occasions, in the United States, that agreements to oust American courts of their jurisdiction and to confer jurisdiction upon a foreign court, are void and will be denied enforcement[7]. Although no case in point involving international loans is known to the present writer, the practice of American lenders bears testimony to the fact that they are fully aware of the problem. Fear of the unenforceability of jurisdictional "ousters," together with the preoccupation, common to all lenders, to confer jurisdiction upon the courts of their own country, may explain why clauses found in American loan contracts

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[6] See, e.g., in France, Delaume, American-French P.I.L., pp. 57 *et seq.*; in Switzerland, Nussbaum, American-Swiss P.I.L. p. 32; in Denmark, Philip, American-Danish P.I.L., p. 25; in Germany, Lorenzen, "The Conflict of Laws of Germany," 39 Yale L.J. (1930) 804, 825–6. Dutch law is more restrictive since the parties cannot oust a Dutch court from its jurisdiction. However, when the parties have agreed to confer jurisdiction upon the courts of a foreign country and either of them bring suit in a Dutch court, the court will dismiss the suit without passing on the merits since otherwise the agreement would be violated. See Kollewijn, American-Dutch Private International Law (1955, hereinafter American-Dutch P.I.L.) p. 20. The validity of ousters of jurisdiction is also upheld in England. See, e.g., Law v. Garett (1878) 8 Ch. D. 26; Pena Copper Mines Ltd. v. Rio Tinto Co., Ltd. (1912) 105 L.T.R. 846; Austrian Lloyd Steamship Co. v. Gresham Life Assurance Soc., Ltd. [1903] 1 K.B. 249; Cap Blanco [1913] P 130. See also Heilman, "Arbitration Agreements and the Conflict of Laws," 38 Yale L.J. (1929) 617; Smith, "Personal Jurisdiction," 2 Int'l and Comp. L.Q. (1953) 510, 511 *et seq.* The Draft Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods adopted on October 24, 1956 at the Eighth Session of the Conference on Private International Law at the Hague, expressly provides that the court designated by the parties shall have exclusive jurisdiction. See art. 2 of the Draft Convention, 5 Am. J. Comp. L. (1956) 653. This Draft Convention, however, does not apply to the sale of securities (art. 1).

[7] See, e.g., Kunhold v. Compagnie Générale Transatlantique, 251 F. 587 (1918); Otero v. Banco de Sonora, 26 Ariz. 356, 225 P. 1112 (1924); State of Oregon, ex. rel. Kahn v. Tarzwell, 125 Or. 528, 266 P. 238, 59 A.L.R. 1436 (1928); De Gorter v. Banque de France, 176 Misc. 1062, 29 N.Y.S. 2d 842 (1941), aff'd 30 N.Y.S. 2d 815, 287 N.Y. 483; Alvers v. Crédit Suisse, 188 Misc. 229, 67 N.Y.S. 2d 239 (1946). See, however, *contra*, Mittenthal v. Mascagni, 183 Mass. 19, 66 N.E. 425 (1903); Cerro de Pasco Copper Corp. v. Knut Knudsen, 187 F. 2d 990 (2d Cir. 1951); Muller v. Swedish American Line, Ltd. 224 F 2d 806 (2d Cir. 1955). See also note 12 *infra*. It has been recently proposed that the parties' agreement as to the place of suit "be given effect if it is deemed to be fair and reasonable." Such an agreement would be disregarded "if it is the result of overreaching or of unequal bargaining power or if it restricts unreasonably plaintiff's choice of a forum." (American Law Institute, Restatement of the Law, Second, Conflict of Laws, Tentative Draft No. 4, April 5, 1957, §117 a, comment a, pp. 58–59). Even though the proposed rule would still be more restrictive than that prevailing in Europe, it would constitute an improvement on present American practice, especially if the rule is made applicable to international as well as to interstate conflicts of laws.

confer jurisdiction upon American courts even in those cases in which jurisdiction is also conferred upon the courts of some foreign country[8].

Subject to these limitations, stipulations conferring jurisdiction upon a particular court are commonly found in loans made by private lenders, in American as well as in other leading financial markets, to private borrowers and, to a lesser extent, to foreign governments or international organizations.

As yet, private lenders do not seem to have made the same extensive use of arbitral compacts as they do of jurisdictional clauses. Although examples of such compacts in loans to private borrowers are known to exist, especially in Switzerland[9] and the Netherlands[10], settlements of loan disputes by arbitration have been provided for primarily in loans to foreign governments or their political subdivisions[11]. It is not impossible that recent statutory developments encouraging arbitration settlements may modify the prevailing practice and result in a wider use of arbitration as a means of settling international loan disputes[12].

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[8] In some cases, when American courts would not normally have jurisdiction over the borrower, an express stipulation that American, in addition to foreign courts, shall have jurisdiction may be the only way to secure an American forum. There may, therefore, be several justifications, based on practical considerations, for those provisions in American loan documents which confer cumulatively jurisdiction upon American and foreign courts. See text *infra* and note 27.

[9] See, e.g., the following prospectuses: Anglo-American Corporation of South Africa, Ltd., 4% Loan of 1950; Orange Free State Investment Trust, Ltd., 4½% Loan of 1952; West Rand Investment Trust, Ltd., 4½% Loan of 1954; Anglo-American (O.F.S) Housing Company, Ltd., 4½% Loan of 1955.

[10] See, e.g., Naphtachimie, S.A. Paris, 4¼% Loan of 1955.

[11] See, e.g., the following agreements between American bankers and the Government of Nicaragua (September 1, 1911, Article V, Section 2, reprinted in Dunn, American Foreign Investments (hereinafter Dunn), p. 344); El Salvador (June 24, 1922, Article IX, Dunn, p. 227); Haiti (October 6, 1922, Article XXII, Dunn, p. 308). Provision for arbitration was made in the General Bond of the State of São Paulo 7% Coffee Realisation Loan floated in England in 1930. A similar provision is also found in a recent loan made by Swiss bankers to a foreign government. See also Domke, "Arbitration Clauses and International Loans," 3 Arb. J. (1939) 161. A number of loan contracts between bankers and the European Commission for the Danube (E.C.D.) provided expressly for the settlement of disputes by way of arbitration. See, e.g., Loan dated July 21, 1860 between Banque Ottomane and E.C.D., art. 9; Loan dated November 28, 1919 between Société Générale and E.C.D.; Loan dated January 31–March 16, 1928 between Banque des Pays de l'Europe Centrale and E.C.D.

[12] See, e.g., New York Civil Practice Act, Sections 1448 *et seq.*; Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931), and Annotations 73 A.L.R. 1453; 135 A.L.R. 79. See also in respect to a recent French statute, Delaume, "Arbitration of Loan Disputes under French Law," 10 Arb. J. (N.S.) (1955) 196.

Recourse to arbitration, in one form or another[13], is characteristic of the practice followed by governments and international lending organizations when they lend money to one another or to private borrowers. This last observation deserves attention because it is illustrative not only of a favorable trend towards arbitration settlements, but also of a more general consideration that the privileged position of lenders has frequently a decisive influence upon the solution of the jurisdictional issue and the selection of the proper tribunal. It is quite significant, for instance, that while international lending organizations have agreed to submit to the jurisdiction of the courts of the market from which they were borrowing, they, in their position as lenders, have sought to withdraw disputes with their borrowers from the jurisdiction of national courts.

For all relevant purposes, the practice of lenders in respect to jurisdictional problems conforms to their practice regarding the solution of conflict of laws issues. Faced with the complexities of private international law, lenders try to avoid these complexities by bringing within one and the same system of law, generally their own, the relations created by the loan contract and the possible disputes arising thereunder. "One judge, one law, preferably my own" seems to be the credo of international lenders. This practical consideration, easily understandable, should be kept in mind in analyzing the manner in which lenders have attempted to overcome jurisdictional difficulties.

One preliminary point should be mentioned, however. The following developments shall be limited to problems concerning jurisdiction *in personam*. Rules concerning jurisdiction *in rem* offer a wide area of similarity throughout the world and the practice of lenders is to stipulate that, as to the enforcement of mortgages or other securities, the courts at the situs shall have jurisdiction[14]. For this reason, provisions relating to

[13] Sometimes, as in the case of intergovernmental loans or loans made by the International Bank for Reconstruction and Development, or by the Bank for International Settlements, the classical pattern of arbitration, that is the settlement of disputes by one arbitrator or by a panel of arbitrators, is provided for. In regard to loans made by the High Authority of the European Coal and Steel Community to enterprises of the Community, jurisdiction is conferred upon the Court of Justice of the Community, a solution which may be explained by the original setup of the Community.

[14] A typical provision in this respect is that found in an Indenture of Mortgage between the Mexican Light and Power Company, Limited, and its subsidiaries and National Trust Company, Limited, of February 1, 1950 (Section 12.02) which reads in part as follows:

"... For the purpose of the enforcement of the specific lien of this Indenture under the laws of Mexico and in order to have the necessary authority to carry out under the laws of Mexico any remedies herein set forth relating to such specific lien, the Company and the Subsidiaries and the Trustee agree to subject themselves expressly to the jurisdiction of the Courts of the City of Mexico, Federal District, and to the laws applicable in the Federal District, either

jurisdiction *in rem* will be mentioned in passing only to serve as illustration of practical considerations underlying the drafting of jurisdictional clauses.

I. Loans by Private Lenders to Private Borrowers

Lenders in the leading financial markets of the world insist upon including jurisdictional provisions in loan agreements with foreign borrowers or in bonds and related documents issued in those markets by foreign issuers. In most instances, the courts upon which jurisdiction is conferred are those of the lender's country or state. On a number of occasions, however, such a jurisdictional provision is coupled with stipulations conferring jurisdiction also on the courts of some foreign country, generally the borrower's country or that of the situs of the property pledged or mortgaged as a security for the repayment of the loan. For the purpose of convenience, it is proposed that the first type of stipulation be hereafter referred to as "exclusive jurisdiction clauses," and the second as "multiple jurisdiction clauses."

(a) *Exclusive jurisdiction clauses*

Provisions of the first type, conferring exclusive jurisdiction upon the courts of the lender's country are commonly found in Switzerland. A typical example is as follows:

"Any dispute between the bondholders and the debtor arising out of or in connection with the bonds or coupons shall be decided exclusively by the ordinary courts of the Canton of Basle-City, subject to appeal to the Federal Tribunal at Lausanne whose judgment shall be final" (as translated).[15]

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local or federal, and each formally waives for this purpose the benefits of the laws of its actual domicile or that which it might acquire in the future, saving and excepting any personal rights which the Trustee or the holders of the Bonds may have to enforce the terms and provisions of this Indenture or the bonds or coupons in the Courts or pursuant to the laws of any country having jurisdiction in the premises . . ."

For other examples, see also Sommers, Broches, and Delaume,. *loc. cit.*, 21 Law and Contemporary Problems, Summer 1956, p. 466, note 9.

[15] S. A. Pirelli, External Loan 4½% of 1955, Prospectus, clause 10. The French Text reads as follows:

"La présente opération d'emprunt est régie par la loi suisse. Tout différend entre les porteurs d'une part et le débiteur d'autre part, auquel les obligations ou les coupons de l'emprunt pourraient donner lieu, sera de la compétence exclusive des tribunaux ordinaires du Canton de Bâle-Ville, sous réserve de recours au Tribunal Fédéral à Lausanne, dont la sentence sera exécutoire."

The same provision is found in the following prospectuses: La Rinascente per l'Exercicio di Grandi Magazzini, External Loan 4½% of 1955; Montecatini, Società Generale per l'Industria Mineraria e Chimica, Anonima, External Loan 4½% of 1955; California Texas Corporation, Loan 4½% of 1955.

Again, the Standard Regulations (*Dispositions Générales*) governing the relations between the *Crédit Suisse* and its customers provide:

"All litigation between us and our customers that may result from, or in connection with existing business relations is governed by Swiss law and is to be brought before the court which has jurisdiction over the office concerned of this bank; with the reservation that recourse may be had to the Swiss Federal Court".[16]

Comparable provisions are also found in loans negotiated in other markets. For example, the following provision is found in the United Kingdom:

"The [Borrower] hereby submits to the jurisdiction of the High Court of Justice in England as regards all matters and questions arising hereunder or under the Bonds."[17]

and in the United States:

"The Company hereby subjects itself and its property to the jurisdiction of the Courts of the United States of America and the State of New York and hereby constitutes and appoints The Corporation Trust Company, a New York corporation, or its successor appointed from time to time, having an office in the City of New York, its true and lawful attorney in fact and authorized agent, for it and its name, place and stead, to make and accept service of all writs, processes and summons in any action, suit or proceeding in any of the Courts of the United States of America or of the State of New York, and upon whom all lawful writs, processes and summons may be served with the same effect as though the Company existed in the State of New York; and said appointment of said The Corporation Trust Company, or its successor, shall be irrevocable so long as any of the Bonds remain outstanding.

Any successor to The Corporation Trust Company shall become such attorney-in-fact and authorized agent for the Company without any further act on the part of said The Corporation Trust Company or any such successor. In case The Corporation Trust Company and/or any such successor shall cease to exist, the Company agrees, upon the request of the American Trustee, forthwith to appoint a person or corporation having a residence in the City of

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[16] Official translation, article 11. The French text reads as follows:

"Tous litiges qui pourraient surgir entre nos clients et nous dans nos relations d'affaires ou qui seraient en corrélation quelconque avec ces affaires seront jugés d'après le droit suisse et portés devant les tribunaux compétents dont relève le siège intéressé de notre établissement, sous réserve de recours au Tribunal Fédéral."

Similar provisions are found in the Conditions Générales of the Union de Banques Suisses (art. 10) and Société de Banque Suisse (art. 12).

[17] Trust Deed between English lenders and an Austrian corporation.

New York, selected by the American Trustee, as its true and lawful attorney-in-fact and authorized agent with the powers and for the purposes provided in this Section 15."[18]

No such clause is found in France. Apparently, French lenders believe that they are sufficiently protected by articles 14 and 15 of the French Civil Code which gives jurisdiction to French courts by reason only of the French nationality of the lenders, as well as by the numerous other grounds for the jurisdiction of the French courts, such as the making and performance of the loan contract[19], or the issuance of bonds[20] in France. In this field, as in that of the conflict of laws[21], French lenders seem satisfied that French law affords them a protection sufficient to make jurisdictional or conflict of laws provisions unnecessary[22].

In Canada, where there have been relatively few examples of inter-

[18] Indenture of October 1, 1925, Rudolph Karstad A.G., First Mortgage 7% Sinking Fund Gold Bonds, Section 15.

[19] See, e.g., Cass. January 14, 1934, Banque Hypothécaire Franco Argentine v. Bonnard et Hourtille, Journal du Droit International Privé (hereinafter Clunet), 1934, 1202; Court of Appeal Besançon May 15, 1929, Société du Port de Para v. Côte, Clunet 1929, 1253. Comp. Court of Appeal Rouen June 26, 1929, Chemin de Fer de Sao Paulo et Rio Grande v. Barbey, Sirey, 1930.2.36, Clunet 1931, 630; Court of Appeal of Paris January 31, 1928, Zelinoff v. Banque de Sibérie, Revue Critique de Droit International Privé (hereinafter Rev.), 1928, 291. aff'd Cass. July 29, 1929, Rev. 1930, 99, Sirey 1929.1.350; Cass. October 24, 1933, Banque d'Athènes v. Banque Lisboa et Açores, Rev. 1934.484.

[20] The law of July 11, 1934 provides in its single article:

"Claims concerning the repayment of [the principal of] securities issued [in France] by corporations or collectivities [including municipalities and political subdivisions of a foreign state] or concerning the payment of coupons shall be brought before the courts at the place where the defendant corporation or collectivity has its seat [*siège social*], if the latter is located in France. If the defendant corporations or collectivities have their seat in a foreign country, such claims shall be brought before the courts of the *Seine* [Paris], unless, prior to the issuance of bonds, the defendants have elected domicile [agreed to confer jurisdiction upon a certain court] in France, in which case the court at the elected domicile shall have jurisdiction." (as translated).

Article 37 of the decree-law of October 30, 1935 also provides:

"The jurisdictional rules provided for in the law of July 11, 1934, concerning the repayment of securities issued by foreign corporations or collectivities, are applicable to any claim involving the rights of holders of bonds or securities of one and the same issue." (as translated).

As to jurisdiction over foreign corporations see Delaume, "Les Conflits de Juridictions en Matière de Sociétés," J.C.P. 1950.I.849.

[21] See Sommers, Broches, and Delaume, *loc. cit.*, 21 Law and Contemporary Problems, Summer 1956, p. 467.

[22] The French practice of relying upon the French statutory or case law in this field may prove dangerous. The almost general nonrecognition in foreign countries of French judgments obtained by French lenders or bondholders to enforce gold clauses bears sufficient testimony to this remark.

national loans, no jurisdictional provision is found in the most recent bond issues. It is true, however, that these bonds are governmental bonds and that considerations of sovereign immunity may have acted as a deterrent to jurisdictional stipulations[23]. It is remarkable, however, that in several loans involving banks and private borrowers resident in different Provinces of Canada, the parties generally agree that the courts of the Province in which the borrower resides shall have jurisdiction[24]. This exception to the general practice to stipulate the jurisdiction of the lender's court may be more apparent than real because the lender has in most cases an agency or a branch, or is acting in participation with bankers, in the Province of the borrower where the negotiations also take place. For this reason, the Canadian example is exceptional.

(b) *Multiple Jurisdiction Clauses*

Especially when a loan is secured by a pledge or mortgage on foreign assets of the borrower, jurisdiction may be conferred both upon the courts of the lender and the courts of the borrower or those at the situs of the pledged or mortgaged property.

These multiple jurisdiction clauses are rather frequent in American practice. Thus the American indenture quoted above, after conferring jurisdiction upon American courts, also provides:

"The Company also hereby subjects itself and its property to the jurisdiction of the Courts of Hamburg, Germany. The provisions of this Section 15, however, are not intended in any way to limit the right of the Trustees and of the Bondholders to bring suits, actions or other legal proceedings in any courts which they or any of them may deem proper."[25]

[23] See, e.g., Commonwealth of Australia, Canadian Bonds of 1955.

[24] See, e.g., Deed of Trust and Mortgage May 1, 1951 from Alaska Pine & Cellulose Ltd. (a British Columbia corporation) and Montreal Trust Co. (a Quebec corporation), Section 79 (16): "All questions or controversies as to the liability of the Trustee hereunder shall be decided and determined under the laws of, and, if litigation thereon be instituted, by the courts of, the Province of British Columbia."

[25] Indenture of October 1, 1925, Rudolph Karstadt A. G., First Mortgage 7% Sinking Fund Gold Bonds, Section 15. See also the following provision in an Indenture of March 1, 1926, Roman Catholic Church in Bavaria, Twenty-Year Sinking Fund Gold Bonds, Series A, Article IV, Section 8:

"Without prejudice to the right of the Trustee to have recourse to proceedings in Germany or elsewhere, the Gesamtverband hereby subjects itself and its property to the jurisdiction of the Courts of the United States and of the State of New York as regards all actions, suits or proceedings arising out of this Indenture or the Bonds and coupons issued hereunder, and does hereby constitute and appoint the Consul General of the Republic of Germany in the State of New York its true and lawful attorney in fact and authorized agent for it and in its name, place and stead, to make and accept service of all writs, processes and summonses in any action, suit or proceedings in any of the Courts of the State of New York or of the United States and

Another example is the following:

"[The parties] designate the City of Havana, Cuba, or the City of New York, State of New York, or both of said cities, as the Trustee in any case shall elect, as the place where all summonses, citations, writs, legal process and judicial proceedings, which may take place by reason of this Indenture, shall be carried into effect and substantiated . . ."[26]

A superficial reading of these clauses raises the question whether they solve any real difficulty. Inasmuch as the courts selected by the parties, such as the foreign courts at the domicile of the borrower or at the situs of his property, would normally have jurisdiction, the above clauses add nothing to the ordinarily applicable jurisdictional rules. Nevertheless, a general condemnation of the prevailing American practice would, at the least, be hasty. In the field of international lending, especially in the case of bond issues, the rule is that in the absence of an express consent to the jurisdiction of American courts the latter would lack jurisdiction. In the majority of cases, foreign borrowers are not doing business in the United States, do not own property there, and cannot be served there[27].

upon whom all such lawful writs, processes and summonses may be served, with the same effect as though the Gesamtverband existed in the State of New York and, with respect to the jurisdiction of the Courts of the United States, as though the Gesamtverband was an inhabitant of the Southern District of New York."

Comp. the indenture involved in Ehrlich v. German Sav. Bank & Clearing Ass'n, 132 N.Y.L.J. Aug. 2, 1954, p. 5, col. 3 (American and German courts having jurisdiction).

That even careful wording of this type of jurisdictional clause may not be sufficient to avoid every conceivable pitfall, is well illustrated by the case of Weinstein v. Siemens & Halske Aktiengesellschaft, 26 F. Supp. 410 (D.C.N.Y. 1939, aff'd 105 F. 2d 1023). In that case an indenture contained a provision similar to the above-quoted clause except that the submission to American courts was limited to suits brought against the obligors by the trustee or "any debenture holder." Despite the probable intent of the parties, it was held that this provision could not be invoked by a holder of defaulted "coupons." In reachin this conclusion, the court made the rather candid statement that: "Whether there was or was not in the minds of the parties a good ground for creating that distinction [between holders of debentures and holders of coupons] cannot concern us, however harsh it may seem for a holder of defaulted coupons to be helpless in respect to personal service on the defendants or any properly designated agent. That is among the hazards involved in dealings with foreign corporations, to say nothing of the inelasticity of a formal agreement such as an indenture." (*Ibid.* at p. 412).

[26] Indenture dated July 1, 1935, between Compania Azucarera Vicana (Vicana Sugar Company) and an American Trust Company. This provision was held to refer exclusively to actions maintained by the trustee against the Company, to the exclusion of actions brought against it by any other person, in Wahl v. Vicana Sugar Company, 144 N.Y.S. 2d 613 (1955).

[27] The case of direct loans is somewhat different. Frequently, lenders request the borrower to pledge specific assets owned by them in the United States. In such a case, American courts would, even in the absence of an express submission, have jurisdiction over the pledged assets. The fact that this jurisdiction would be quasi in rem rather than in personam matters little provided the assets are sufficient to yield enough proceeds to secure the repayment of the loan.

Consequently, express submission to American courts becomes essential since without it the borrower could not be sued in the United States. Multiple jurisdiction clauses offer, therefore, the maximum security to American lenders. Such a clause guarantees lenders against pleas to the jurisdiction of American courts, while permitting them to sue their debtor in the courts of his own country or of any country having jurisdiction.

Because of these obvious advantages, multiple jurisdiction clauses are also found in markets outside the United States, such as the English or the Swiss markets. True, there is much less chance in these countries that lenders would be deprived of a local forum since such facts as the making or the performing of loans in the United Kingdom or Switzerland are sufficient ground for the jurisdiction of the English or Swiss courts. However, even in these countries, express submission to the lenders' courts is still useful in that it definitely prevents the borrower from raising objections to the jurisdiction of the court designated in the agreement.

A typical example in England is found in a trust deed between English lenders and an Austrian company which, after a recital of express submission to the English courts[28], provides further as follows:

"Provided always that nothing in this clause contained shall hinder or prevent the trustees from taking proceedings in the courts of Austria or other countries where the mortgaged premises are situated and from exercising all rights and powers under the Laws for the time being in force in Austria or other countries where the mortgaged premises are situated which they would have been entitled to take or exercise if this clause had not been inserted."

The wording of this provision makes it quite clear that by providing for the jurisdiction of the English courts, English lenders do not intend to deprive themselves of any of the remedies to which they would be otherwise entitled.

In Switzerland, a number of recent loan documents contain similar provisions such as the following:

"Any dispute between the bondholders, on the one part, and, on the other, the debtor, arising out of or in connection with the bonds or coupons shall be decided *exclusively* by the ordinary courts of the Canton of Basle-City, subject to appeal to the Federal Tribunal at Lausanne whose judgment shall be final.

[28] See text above and note 17.

The bondholders shall have also the right to bring their claims before the Belgian courts."[29] (*italics added*)

Despite its obvious intent, the wording of this clause is not altogether satisfactory. It seems somewhat contradictory to reserve "exclusive" jurisdiction to Swiss courts, while simultaneously providing that Belgian courts may also have jurisdiction. Jurisdiction in this case is not "exclusive." It is alternative or cumulative as the case may be. This contradiction has been removed from the most recent Swiss prospectuses in which the word "exclusive" is no longer present. Thus the prospectus of the California Texas Corporation Loan 4%, 1956, now provides:

"Any dispute between the bondholders, on the one part, and, on the other, the California Texas Corporation or the Guarantors, concerning the bonds and/or the coupons of this loan shall be governed by Swiss law and shall be decided by the ordinary courts of the Canton of Zurich, subject to appeal to the Federal Tribunal at Lausanne. To this effect, the California Texas Corporation and the Guarantors elect domicile with the Credit Suisse at Zurich.

The bondholders shall be free to exercise any rights and to bring any legal proceedings in the courts of any country where the California Texas Corporation and/or the Guarantors have registered."[30] (as translated)

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[29] Compagnie Financière Belge des Pétroles, External Loan 4%, 1954, Prospectus, Clause 10. The French text is as follows:

"Tout différend entre les porteurs, d'une part, et le débiteur, d'autre part, auquel les obligations ou les coupons de l'emprunt pourraient donner lieu sera de la compétence exclusive des tribunaux ordinaires du canton de Bâle-Ville, sous réserve de recours au Tribunal Fédéral à Lausanne, dont la sentence sera sans appel. Les obligataires auront également la faculté de faire valoir leurs droits auprès des tribunaux belges."

For other examples see also, Compagnie Française des Pétroles External Loan 4%, 1955; Péchiney, External Loan 4¼%, 1954; Instituto Mobiliare Italiano, External Loan 4½%, 1955; International Standard Electric Corporation, New York, Loans 3½% and 4%, 1954.

[30] See also, Article V, Section 2 of an Indenture, dated July 1, 1954, between International Standard Electric Corporation, International Telephone and Telegraph Corporation, and The National City Bank of New York, as Trustee, which provides that in case of default:

". . . The Trustee shall institute, in any court of competent jurisdiction in any place in any country, wherein jurisdiction may be obtained, such action or proceeding at law or in equity as may be advised by counsel for the collection of the sums so due and unpaid, and may prosecute any such action or proceeding to judgment or final decree, and may enforce any such judgment or final decree against the Corporation and/or the Guarantor, and collect in the manner provided by law out of the property of the Corporation and/or the Guarantor, wherever situated, the moneys, adjudged or decreed to be payable. In furtherance but not in limitation of the foregoing, it is expressly agreed by the Corporation, the Guarantor, the Trustee and the Debentureholders that the ordinary courts of the Canton of Zurich shall be courts of competent jurisdiction in Switzerland for all matters above referred to."

Comp. the Conditions Générales of the Société de Banque Suisse, article 12, para. 2: "Any dispute between the Bank and the Customer, without regard to his residence or domicile, shall be decided by the Courts of the place where the branch which keeps the Customer's account

II. Loans by Private Lenders to Foreign Governments and International Organizations

Exclusive and multiple jurisdiction clauses are not limited to loans between private persons. These clauses are also found in loans made by private lenders to foreign governments and international organizations, even though the effectiveness of such clauses is sometimes questionable because of the jurisdictional immunity which may benefit the borrower.

The case of government loans is typical. From the number of successful pleas of immunity reported in the leading lending countries, the situation of creditors of foreign governments appears difficult[31]. True, inasmuch as the doctrine of relative immunity progressively supersedes that of absolute immunity, the situation of lenders improves *pro tanto*. Thus, in those countries which make a distinction between acts *jure imperii* and acts *jure gestionis*, the outcome of a suit against a foreign government depends upon the characterization of foreign government borrowing. If borrowing is characterized as an act *jure gestionis*, the action will be allowed to proceed[32]. If borrowing is regarded as an act *jure imperii*, the

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is situated, subject to recourse to the Swiss Federal Court [Tribunal] in the cases provided by the law. It shall nevertheless be open to the Bank to resort to any competent court or authority in order to enforce its rights, in particular to those of the Customer's country of residence or domicile, in which case also Swiss law shall apply." (Official Translation).

[31] See, e.g., *United States*: Frazier v. Hanover Bank 119 N.Y.S. 2d 319, aff'd 119 N.Y.S. 2d 918, 281 App. Div. 861 (1953), reargument and appeal denied 127 N.Y.S. 2d 815, 283 App. Div. 655. See also, Frazier v. Foreign Bondholders Protective Council, 125 N.Y.S. 2d 900, 283 App. Div. 44 (1953); Frazier v. Foreign Bondholders Protective Council, 133 N.Y.S. 2d 606 (1954); Anderson v. Spyers, 115 N.Y.S. 2d 132 (1952); Lamont v. Travelers Insurance Co., 24 N.E. 2d 81, 281 N.Y. 362 (1939); Deak, "The Plea of Sovereign Immunity and the New York Civil Practice Act," 40 Col. L. Rev. 453 (1940); *England*: Wadsworth v. Queen of Spain (1851) 17 Q.B. 171; Twycross v. Dreyfus (1877) 5 Ch. D. 605; *France*: Cass. January 22, 1849, Lambèze et Pujol, Dalloz 1849.1.10; November 30, 1934, Gouvernement du Maroc v. Laurans, Revue 1935, 795, Sirey 1935.1.31. See also Tribunal Civil Seine November 14, 1934, Huttinger v. Société des Chemins de Fer du Congo, Clunet 1935, 623, involving a suit against the Belgian Government as guarantor of bonds issued by the Congo Railways Company; Court of Appeal of Paris October 31, 1956, Congo Belge v. Montéfiore, J.C.P. 1956, II, 9605. These views have been endorsed by the Institute of International Law as recently as 1954. See 46th Session, Resolutions, Article 4:

"The courts of a state cannot entertain actions against a foreign state relative to debts incurred by that state through a public loan in the territory of the state whose courts are seized of such actions." 46 Am. J. In't'l L. 80 (1955).

Comp. Harvard Draft Convention, Article 11, 26 Am. J. Int'l L., Supp. (1932) 597.

[32] See, e.g., *Italy* Court of Appeal of Lucca March 14, 1887, Hamspohn v. Bey di Tunisi, Foro Italiano 1887.1.474; *Switzerland*: Federal Tribunal March 13, 1918, K. K. Oesterreich. Finanzministerium v. Dreyfus, R. O. 44.1.49. The Swiss distinction between acts *jure imperii* and acts *jure gestionis* is, however, complicated by the additional consideration that, even in regard to acts *jure gestionis* no jurisdiction is acknowledged unless the loan transactions are

plea of immunity is likely to be successful[33]. Nevertheless, due to the somewhat hazy character of this distinction, it remains difficult to forecast safely the possible outcome of any proceedings against a foreign sovereign.

The difficulty is increased since, in the present state of the law, it is not entirely clear which persons enjoy the benefit of sovereign immunity. Thus, whereas it has been held in the United States that a state member of the Brazilian Federation could plead immunity[34], the contrary view prevails in France[35]. Again, while a certain similarity is noticeable in the

somehow connected with the Swiss territory either because the loan contract has been made, or the issuance of bonds has taken place in Switzerland, or payment is to be made in that country. If no such contact exists, Swiss courts will decline jurisdiction. See, e.g., Federal Tribunal March 18, 1930, République Hellénique v. Walder, R. O. 56.I.237. See also Allen, The Position of Foreign States before National Courts (1933) pp. 283–5. In *France*, a recent decision of a lower court, probably influenced by the Italian or the Swiss doctrine held that "a loan floated in France by a foreign government cannot be regarded as an act *jure imperii* beyond the jurisdiction of the French courts." Tribunal Civil Seine February 16, 1955, Montéfiore v. Congo Belge, J.C.P. 1955,II,8580. However, this judgment has now been reversed. See Court of Appeal of Paris October 31, 1956, Congo Belge v. Montéfiore, J.C.P. 1956, II, 9605. See also, in *Belgium*: Court of Appeal Brussels May 24, 1933, Mahieu et al. v. République Hellénique, Clunet 1935, 1034; Tribunal Civil Brussels April 30, 1951, Socobelge et Etat Belge v. Etat Hellénique, Journal des Tribunaux 1951, 298, Clunet 1952, 244, Sirey 1953.4.1.

[33] This characterization, together with the fact that the relation involved presented no contact with the Swiss territory, may underlie the judgment of the Swiss Federal Tribunal of March 18, 1930, cited in the preceding note. What bearing the Department of State statement of policy released in May 1952 (26 Dept. State Bull. (1952) 984) may have on this problem is as yet difficult to forecast. See M. H. Cardozo, "Sovereign Immunity: the Plaintiff Deserves a Day in Court," 67 Harv. L. Rev. (1954) 608; M. Brandon, "Sovereign Immunity of Government-Owned Corporations and Ships," 39 Cornell L.Q. (1954) 425; W. W. Bishop, Jr., "New United States Policy Limiting Sovereign Immunity," 47 Am. J. Int'l L. (1953) 93. See also Zilber, "International Law—Sovereign Immunity—Seizure of Property under Restrictive Immunity Doctrine," 54 Mich. L. Rev. (1956) 1008.

[34] Sullivan v. State of São Paulo, 36 F. Supp. 503 (1941).

[35] Cass. October 24, 1932, Etat de Céara v. Dorr, Clunet 1933, 644, Dalloz 1933.1.196. See also Tribunal Civil Seine December 11, 1922, Crédit Foncier d'Algérie et de Tunisie v. Restrepo et Département d'Antioquia, Clunet 1923, 857, Annual Digest 1919–1922, Case 201; Tribunal Civil Seine March 2, 1948 Dumont v. Etat de l'Amazone, Dalloz 1949, 428; Comp. Court of Appeal Brussels November 22, 1907, Feldman v. Etat de Bahia, Pasicrisie 1908.2.55.

Both the American and the French law seem, however, in accord that cities or municipalities cannot plead immunity. See, e.g., Schneider v. City of Rome, Italy, 83 N.Y.S. 2d 756, 193 Misc. 180 (1948), 43 Am. J. Int'l L. 382 (1949); Court of Appeal Paris June 19, 1894, Ville de Genève v. De Civry, Dalloz, 1894.2.513. Cass. January 14, 1931, Bonnand v. Ville de Tokio and Ville de Tokio v. Ronssey, Dalloz 1931.1.25 (implicit).

It is, however, interesting to note that, in a recent case involving a suit by French holders of bonds issued by the City of Constantinople with the guarantee of the Government of Turkey, the Court of Appeal of Paris held that, even though the principal obligor was subject to the jurisdiction of the French courts, the guarantor could successfully plead immunity since its own obligation was distinct from that of the principal debtor and the guarantee could not be construed as a waiver of immunity. See Paris January 29, 1957, Société Bauer-Marchal v. Ministre des Finances de Turquie, J.C.P. 1957,II, 9779; Clunet (1957) 392.

most recent American and French law concerning the treatment of governmental agencies engaged in commercial activities[36], there remain serious differences between the two systems of law as well as between them and the law of England[37]. The same is true in respect to the treatment of government-owned corporations[38].

Furthermore, while it is generally agreed that a foreign sovereign may waive its immunity in court by acting as a plaintiff or appearing generally[39], there is no consensus of opinion as to whether contractual waivers of immunity are valid and binding upon a foreign sovereign[40] or as to what acts are necessary to constitute such a waiver[41].

[36] Comp. Treaty of September 3, 1951, between France and the USSR (art. 10), Journal Officiel February 27, 1953, 1960, with the following treaties between the United States and (1) Japan, April 2, 1953 (art. 18,2) TIAS 2863; (2) Greece, August 3, 1951 (art. 14,5) TIAS 3057; and (3) Israel, April 3, 1954 (art. 18,3) TIAS 2948.

[37] See, e.g., Brandon, *loc. cit.*, 39 Cornell L.Q. (1954) 425.

[38] *Id.* Cases involving central banks or government-owned banks may deserve proper mention in view of the role that such organizations often play in international borrowing. Continental countries generally deny immunity to foreign central banks engaged in borrowing or other financial transactions. See, e.g., *France*: Tribunal Civil Seine June 16, 1955, Passelaigues v. Banque Hypothécaire de Norvège, Dalloz 1956, Sommaires, page 39, col. 1, Gazette du Palais July 23–26, 1955; *Egypt*: Borg v. Caisse Nationale d'Epargne Française, Annual Digest 1925–26, 171; *Switzerland*: see Guggenheim, Traité de Droit International Public (1953) 186. In the *United States*, the answer depends upon whether the central bank is a separate entity or is indistinguishable from the foreign government. In the first instance there is no immunity. See, e.g., Ulen & Co. v. Bank Gospodarstwa Krajewo, 261 App. Div. 1, 24 N.Y.S. 2d 201 (1940); Koster v. Banco Minero de Bolivia, 307 N.Y. 831, 122 N.E. 2d 325 (1954), 283 App. Div. 927, 130 N.Y.S. 2d 870. There is immunity in the second instance. See Kingdom of Sweden v. New York Trust Co., 96 N.Y.S. 2d 779, 197 Misc. 431 (1949).

[39] See, e.g., Porto Rico v. Ramos, 232 U. S. 627 (1914); The Secundus, 15 Fed. 713 (E.D. N.Y. 1926); Republic of Haiti v. Plesch. 88 N.Y.S. 2d 9 (1949); Sultan of Johore v. Abubakar (1952) 1 All E.R. 1261. In *France*, it has been held in an action by bondholders against the French agents of a foreign government that the mere fact that the foreign government intervened in the proceedings to plead immunity amounted to a waiver of the same, a rather puzzling decision. See Court of Appeal Paris April 2, 1936, Viel v. Crédit Lyonnais et Banque de Paris et des Pays Bas, Rev. 1936, 787.

[40] Contractual waivers of immunity are generally held valid and binding on the continent, see, e.g., *France*: Tribunal Civil Seine April 10, 1888, Rochaid-Dahdah v. Gouvernement Tunisien, Clunet 1888, 670; comp. Tribunal Civil Casablanca March 10, 1955, Ministère de l'Éducation Publique du Portugal v. Di Vittorio, Rev. 1955, 534; *Germany*: Heizer v. Kaiser Franz-Josephs-Bahn A.G. (1885) Beilage I, 1, 20–21; *Switzerland*: Federal Tribunal October 7, 1938, Etat Yougoslave v. S. A. Sogerfin, 61 La Semaine Judiciaire 327 (1939). In *England*, these waivers are not irrevocable. See, e.g., Duff Development Co. Ltd. v. Government of Kalatan (1924) A. C. 797; Kahan v. Pakistan Federation (1951) 2 K.B. 1003. In the *United States*, it is far from clear whether such a waiver would be held irrevocable. See, e.g., De Simone v. Transportes Maritimos de Estado, 199 App. Div. 602, 191 N.Y.S. 864, 867 (1st Dep't 1922) (dictum), aff'd on rehearing; 200 App. Div. 82, 192 N.Y.S. 815 (1st Dep't 1922); Lamont v. Travelers Ins. Co., 281 N.Y. 362, 370, 24 N.E. 2d 81 (1939) (dictum), reversing 254 App. Div. 511, 5 N.Y.S. 2d 295 (1st Dep't 1938); Fields v. Predionica I Tknica A.D., 265 App. Div. 132, 37 N.Y.S. 2d 874, 883 (1st Dep't 1942) (dictum), reversing 35 N.Y.S. 2d 408 (Sup. Ct. 1942); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E. 2d 577 (1944). But see

It is, therefore, in the light of these considerations, that lenders' practice must be appraised. Thus, it is easy to understand why submission to the local courts is not customary in loans issued by foreign governments in the United Kingdom where contractual waivers of immunity are revocable[42], whereas such provisions are commonly found in Switzerland where waivers of immunity are irrevocable[43]. A typical Swiss example is found in clause 12 of the prospectus of the Union of South Africa Loan 4%, 1954:

"Any disputes between the bondholders and the Government of the Union of South Africa arising out of the bonds or coupons shall be governed by Swiss law and shall be decided by the Tribunal of the Canton of Zurich, subject to appeal to the Federal Tribunal, at Lausanne. The bondholders shall have also the right to bring their claims and to institute legal proceedings before the courts of the Union of South Africa." (as translated)

Similar clauses are also found in recent loans made by American bankers to foreign governments, an example being Section 4, para. 1 of a loan agreement of February 8, 1945, between Chase National Bank of the City of New York and the Kingdom of the Netherlands, which reads as follows:

"The Government hereby irrevocably waives all claim or right to sovereign or other immunity in relation to the enforcement in any jurisdiction of any or all of its obligations and of its warranties and representations under this Agreement, including enforcement of the mortgage of the Security hereunder or in

Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S. 2d 825 (1st Dep't 1940). See also, Harvard Draft Convention, art. 8(c), 26 Am. J. Int'l L. Supp. (1932) 451.

[41] Implied waivers of immunity are more readily accepted by continental than by Anglo-American courts. Continental courts have exercised their jurisdiction over foreign governments deemed to have submitted to their jurisdiction on such grounds as the following: (a) deposit of funds with a local bank for the service of, or as a security for, the loan (see, e.g., Court of Conflicts, Prussia May 29, 1920, X . . . v. Türkischer Militärfiskus, Juristische Wochenschrift, L (1921) II, 773). The same solution also prevailed in France in the case of Cosson v. Etat de Céara, Court of Appeal of Colmar June 27, 1928, Clunet 1929, 1040. See also a dictum in the judgment of the Court of Appeal of Aix, December 30, 1929, Gouvernement du Maroc v. Laurans, Sirey 1930.2.153. But see Tribunal Civil Seine December 30, 1930, Banque Ottomane v. Philippe, Clunet 1931, 1040; or (b) issuance of bonds and promise of repayment within the jurisdiction (see, e.g., Swiss Federal Tribunal March 13, 1918, K.K. Oesterreich. Finanzministerium v. Dreyfus, Recueil Officiel 44.1.49).

However, it has been recently held in France that a guarantee by a foreign government of bonds issued by a municipality, itself not entitled to any jurisdictional immunity, did not constitute a waiver of immunity by the guarantor. See Paris January 29, 1957, Société Bauer-Marchal v. Ministre des Finances de Turquie, J.C.P. 1957, II, 9779; Clunet (1957) 392.

[42] See note 40 *supra*.

[43] *Ibid*.

relation to any claims for breach of warranty or misrepresentation by the Government based on or arising out of this Agreement, and irrevocably agrees that the rights of the Manager or of the Banks or of any of them with respect to repayment of all advances under the loan, with interest and commitment charges thereon, and in and to the Security and with respect to all of its other obligations hereunder and of its warranties and representations may, to the extent deemed necessary or desirable by them or any of them, be finally adjudged or determined in any court or courts of the State of New York or of the United States of America having jurisdiction in the State of New York, or in any other court having jurisdiction, even though such adjudication finally determines the rights or claims of the Government; and the Government hereby submits generally and unconditionally to the jurisdiction of said courts and of any of them in respect of such advances under the loan, with interest and commitment charges thereon, the enforcement of the mortgage of such Security, the enforcement and execution of any judgment against it, and all of its other obligations hereunder."

This last example is particularly interesting in that it reveals the intention of American bankers to assimilate as far as can be done government and private loans. From the point of view of lenders, jurisdictional clauses, in either type of loan, are motivated by the same basic considerations. It is not surprising, therefore, that, despite the uncertain effectiveness of waivers of immunity in this country[44], lenders insist upon inserting in government loans clauses similar to those which are customary in private loans. This brings the American practice much closer to the continental practice than would appear probable from a comparison of American and continental cases.

This review of market practice would not be complete without mentioning a curious clause sometimes found in government loans. This clause provides that disputes between lenders and borrowers shall be decided by the Permanent Court of International Justice (now the International Court of Justice) in The Hague. Examples are found in several pre-World War II loans, such as the External Loan of the French Republic of 1939 issued both in Switzerland and the Netherlands:

"The French Government undertakes to subject any disputes which may arise in connection with the bonds or coupons of this loan to the jurisdiction of the Permanent Court of International Justice." (Article 9, as translated)

This clause is somewhat difficult to understand. The P.C.I.J., like the new I.C.J., had jurisdiction only over disputes involving states as parties litigant. In a dispute between private lenders and a borrowing govern-

[44] *Ibid.*

ment, the Court would have had, therefore, to decline jurisdiction[45], unless the lenders' government espoused their claim and brought action in the Court against the borrower[46]. Despite its impressive character, the above clause did not protect lenders' interests effectively.

This may be the reason why recent loan documents, while providing for the jurisdiction of the I.C.J., couple this provision with another one conferring alternative or subsidiary jurisdiction on domestic courts. This particular type of multiple jurisdiction clause is found in loans recently floated in Switzerland, such as the 1947 loan of the *Régie des Télégraphes et Téléphones*, guaranteed by the Belgian Government:

"Any dispute between the bondholders and the borrower or the guarantor arising out of, or in connection with the bonds or coupons shall be decided exclusively by the International Court of Justice in The Hague, or in default thereof, by the Swiss Federal Tribunal at Lausanne whose judgment shall be final." (as translated)[47]

This improved provision must be cautiously weighed. Apart from its inaccurate wording which, like that of private loans[48], confers "exclusive" jurisdiction upon the I.C.J. while providing also for the jurisdiction of the Swiss Federal Tribunal, the clause is really a sham provision. Since any disputes referred to the I.C.J. by the lenders are likely to be turned down for lack of jurisdiction, all that the clause does in final analysis is to confer jurisdiction upon the Swiss Court. In other words, the clause is misleading. This consideration may explain why any reference to the I.C.J. has disappeared from the most recent government loans issued in Switzerland, such as the Australian Loan 3¾% of 1955:

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[45] Comp. The Anglo-Iranian Oil Case, I.C.J. Reports 1952, 93.

[46] *Cf.*, e.g., The Serbian and Brazilian Loans Cases, P.C.I.J. 1929, Series A, Nos. 21 and 22. But see the Case of Certain Norwegian Loans, I.C.J. reports, 1957, 9. It is easier to understand the following provision inserted in loan contracts between Czechoslovakia and French bankers in connection with the issuance of bonds of the Czechoslovak Republic *guaranteed* by the French Government:

"Any disputes which may arise as to the interpretation or execution of the present provisions shall be subject to the jurisdiction of the Permanent Court of International Justice at The Hague, acting in execution of Article 14 of the Covenant of the League of Nations. The Czechoslovak State undertakes to lay such disputes before the Permanent Court of International Justice whose jurisdiction it accepts." (article 22 of 1932 and 1937 contracts, as translated).

The French Government, as guarantor could effectively seize the P.C.I.J. of any dispute arising out of the loan contract.

[47] External Loan 4% 1947, Prospectus, clause 10. See also Société Nationale de Crédit à l'Industrie, External Loan 4%, 1950; Belgian Congo, External Loans 4%, 1950 and 1952—all guaranteed by Belgium.

[48] See text above and note 29 *supra*.

"Any disputes between the bondholders on the one hand, and, on the other, the Australian Government in connection with the bonds or coupons of this loan, shall be governed by Swiss law and shall be subject to the jurisdiction of the ordinary courts of the Canton of Zurich, subject to appeal to the Federal Tribunal at Lausanne. The bondholders shall also be free to bring their claims and institute any legal proceedings in any courts of the Commonwealth of Australia." (as translated)[49]

This wording reproduces almost word for word that which is currently used in Switzerland in respect to private loans. It is an additional proof that, to the minds of lenders, jurisdictional issues connected with international loans should, as far as feasible, be settled uniformly, whatever the character of the loan involved—government or private.

A similar observation can also be made in respect to loans contracted in leading financial markets by international organizations such as the International Bank for Reconstruction and Development (I.B.R.D.), and the European Coal and Steel Community (E.C.S.C.).

In the case of the I.B.R.D., compliance with the ordinary practice of lenders is facilitated by the fact that, unlike a number of international organizations, the I.B.R.D. does not enjoy general immunity from suit. Such an immunity would have indeed proved harmful to the conduct of the Bank's business which has to rely for the bulk of its operational funds on borrowings in the market. Inability to sue the I.B.R.D. in a local court, might have rendered its bonds less attractive to prospective lenders. For this reason, Article VII, Section 3 of the I.B.R.D. Charter provides in substance that actions may be brought against the I.B.R.D. in the courts of its members in whose territories the I.B.R.D. has an office or has issued or guaranteed securities. In addition, the I.B.R.D. is also subject to the jurisdiction of the courts of member countries in which it has appointed an agent for the purpose of accepting service or notice of process[50]. It is not surprising, therefore, to find in I.B.R.D.

[49] Prospectus, clause 11. The French text is as follows:

"Tous différends pouvant s'élever entre les porteurs d'obligations, d'une part, et le Gouvernement australien, d'autre part, concernant les obligations ou les coupons du présent emprunt seront soumis à la loi suisse et seront de la compétence des tribunaux ordinaires du canton de Zurich, avec possibilité de recours au Tribunal Fédéral, à Lausanne. Les porteurs auront aussi toute liberté d'exercer leurs droits et d'intenter une action légale devant les tribunaux du Commonwealth of Australia."

[50] The entire section reads as follows:

"Section 3. *Position of the Bank with regard to judicial process*

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No ac-

loans the jurisdictional clauses commonly used in the market where the bonds are issued[51].

The case of the European Coal and Steel Community is somewhat more complex than that of the I.B.R.D. The Treaty creating the E.C.S.C. and the Protocol annexed thereto have not granted any specific jurisdictional immunity to that organization. Save for a few exceptions, the rule is that disputes to which E.C.S.C. is a party, are to be decided by domestic courts[52]. This rule, which applies between E.C.S.C. and its members, obtains *a fortiori* in the relations between the E.C.S.C. and nonmember governments which are not bound by any provision of the Treaty. Consequently, the question whether an action against the E.C.S.C. on a loan contracted by it within either a member or a nonmember country is maintainable in the local courts depends exclusively upon the terms of the loan contract and the law of that particular country. Recent jurisdictional provisions in loans made by the E.C.S.C. bear testimony to this remark. Thus, probably because of the difficulty of ascertaining the jurisdictional status of the E.C.S.C. in the United States, American lenders have agreed to submit disputes arising out of the recent E.C.S.C. loan in this country to the Court of Justice of the Community rather than to American courts[53]. On the other hand, in Switzerland the E.C.S.C. has

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tions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

An Agreement of June 29, 1951, between the I.B.R.D. and Switzerland, which is not a member of the I.B.R.D., contains provisions similar to Article VII, Section C. A similar provision is also found in Article VI, Section 3 of the Articles of Agreement of the International Finance Corporation.

[51] Thus, the Dutch prospectus of the I.B.R.D. 3½% Bonds, 1955 provides:

"The bonds are subject to Dutch law. The competent court at Amsterdam will have exclusive jurisdiction over all disputes between the Bondholders and the Bank arising out of the bonds or the coupons." (as translated)

The Swiss prospectus of the I.B.R.D.'s 3½% Bonds, 1955 contains a similar provision in regard to the jurisdiction of the Swiss courts.

[52] Article 40, para. 3 of the Treaty of April 18, 1951, creating the Community. See Lalive, "L'Immunité de Juridiction des Etats et des Organisations Internationales," 84 Recueil des Cours, Hague Academy (1953) 205, 376 *et seq.* Similarly, the Bank for International Settlements (the B.I.S.) does not enjoy any judicial immunity and "may proceed or be proceeded against in any court of competent jurisdiction" subject, however, to arbitration provisions in regard to disputes with central banks (art. 57 of the B.I.S. Charter).

[53] High Authority of the European Coal and Steel Community $25,000,000, 5½% Secured Bonds (Seventh Series) 1957–1975, Prospectus, p. 26. In addition to considerations of jurisdictional immunity, the particular jurisdictional setup of the E.C.S.C., especially the existence of the Court of Justice, may also be responsible for this exception to the general rule that loan disputes are normally submitted to the courts of the lenders.

had to yield to the long-established practice that foreign governments and international organizations normally subject themselves to the jurisdiction of the Swiss courts. Consequently, the 1956 E.C.S.C. loan in Switzerland provides:

"Any disputes between the bondholders, on the one hand, and, on the other, the High Authority which may arise in connection with the loan and the rights thereunder, shall be subject to the jurisdiction of the ordinary courts of the Canton of Zurich, subject to appeal to the Federal Tribunal, at Lausanne, and the High Authority expressly subjects itself to the jurisdiction of these courts." (as translated)

In this, as in other cases, the privileged position of the lenders has had a decisive influence upon the solution of the jurisdictional issue, an observation which has also some bearing upon the settlement of that issue in loans made by public lenders to private borrowers.

III. Loans by Public Lenders to Private Borrowers

The considerations which prompt private lenders to insert jurisdictional clauses in loans made by them to private or public borrowers are relevant to public lenders also. Thus, loans made by such international organizations as the Bank for International Settlements (B.I.S.), the I.B.R.D. and the E.C.S.C. contain provisions for the settlement of loan disputes, generally by way of arbitration.

Sometimes, arbitration is the exclusive method of settling loan disputes. Such is the case in respect to loans made by the B.I.S. to central banks or other financial institutions[54]. Such is also normally the case in regard to I.B.R.D.'s lending transactions. In the case of the latter organization, recourse to arbitration rather than to judicial adjudication of loan disputes is particularly understandable because it is the practice of the I.B.R.D. in accordance with a provision of its charter[55] to require a guarantee of each of its loans to private borrowers by the government of the country in which the project being financed is located. Any dispute between the I.B.R.D. and a private borrower is, therefore, likely to involve the relations between the I.B.R.D. and the guarantor. Judicial adjudication of disputes arising out of these tripartite relations between persons subject to different legal orders might well prove to be complex and cumbersome. This is why it has appeared expedient to provide in the I.B.R.D. Loan Regulations that any controversy between the parties which shall not be determined by agreement shall be submitted to arbi-

[54] Article 56 of the B.I.S. Charter.

[55] See Art. III, para. 4(i), 2 U.N. Treaty Series (hereinafter U.N.T.S.) 134, 144 (1947).

tration by an Arbitral Tribunal. Detailed provisions of these Regulations refer to the composition of this Tribunal, its procedure, the costs of the proceedings, and the enforcement of the award[56].

This jurisdictional clause in loans made by the I.B.R.D. is normally "exclusive" in the sense that:

"The provisions for arbitration set forth in this Section shall be in lieu of any other procedure for the determination of controversies between the parties to the Loan Agreement and Guarantee Agreement or any claim by any such party against any other party arising thereunder or under the Bonds."[57]

In some instances, however, examples of multiple jurisdiction clauses are found in loans made by the I.B.R.D. to private borrowers. This is especially the case when a loan is secured by a mortgage and recourse to the local courts for the enforcement or the foreclosure of the mortgage might prove necessary. In such a case, the standard jurisdictional clause is sometimes varied, the parties to the loan agreeing that:

"Sub-section (j) of Section 7.04 is amended to read as follows:

"(j) The provisions for arbitration set forth in this Section shall be in lieu of any other procedure for the determination of controversies between the parties to the Loan Agreement and Guarantee Agreement or any claim by any such party against any other such party arising thereunder provided, however, that nothing herein shall be deemed to preclude any of the said parties from exercising, or instituting any legal or equitable action to enforce any right or claim arising out of or pursuant to the Trust Deed or the Bonds, and submission to arbitration hereunder shall not be deemed to be a condition precedent or in any way to prejudice such exercise or other enforcement of any such right or claim."[58]

[56] See Loan Regulations No. 4, dated June 15, 1956, Article VII, Section 7.04. With regard to the enforcement of the award it is provided that the award can always be enforced against the I.B.R.D. On the other hand, although the I.B.R.D. can always take action to enforce the award against a private borrower, the I.B.R.D. cannot enforce the award against a guarantor government, except as such procedure may be available against such member government otherwise than by reason of the provisions of the Loan Regulations. In other words, a member government does not necessarily waive its immunity from execution by adhering merely to the arbitral provisions of the Loan Regulations. See Loan Regulations No. 4, Article VII, Section 7.04 (k).

It is as yet too early to advance any positive view as to how the practice of the recently created International Finance Corporation will develop.

[57] Loan Regulations No. 4, Article VII, Section 7.04 (j).

[58] Loan dated August 4, 1955, between the Bank and Karnaphuli Paper Mills, Ltd., Schedule 3, p. 24. Comp. among other loans: loan dated July 19, 1954 between the I.B.R.D. and Oesterreichische Elektrizitätswirtschafts-Aktiengesellschaft (Verbundgesellschaft), Schedule 3, p. 26; Loan dated November 19, 1954, between the I.B.R.D. and The Tata Hydro-Electric Power Supply Company, Limited, The Andhra Valley Power Supply Company, Limited, and The Tata Power Company, Limited, Schedule 3, p. 28.

This adoption by the I.B.R.D. of the alternative of exclusive or multiple jurisdiction clauses brings its practice in close contact with that of private lenders.

The practice of the E.C.S.C. is somewhat different from that of the B.I.S. or the I.B.R.D. Article XVI of the standard form of loan contract between the E.C.S.C. and industrial enterprises within the Community provides in substance that loan disputes shall be submitted for decision to the Court of Justice of the Community, a solution particularly apt because of the exceptional judicial facilities available to the Community.[59]

As yet, jurisdictional clauses seem to remain foreign to loans made to private borrowers by such governments as that of the United States, or such government corporations as the Export-Import Bank of Washington. Loans made by the latter institution, either *proprio motu* or as agent of the United States Government do not ordinarily contain jurisdictional clauses regarding the settlement of possible loan disputes.

IV. Loans by Public Lenders to Public Borrowers

Jurisdictional clauses in loans made by governments to other governments or international organizations are relatively rare. Thus, no jurisdictional provision is found in most of the loans or financial agreements between governments which have been entered into since the end of World War II[60]. The same is true of the Loan Agreement of March 23, 1948, between the United States and the United Nations[61], or the Loan Agreement of April 23, 1954, between the United States and the European Coal and Steel Community[62].

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[59] This Article, as translated, reads as follows:

"The parties agree to submit to the arbitration of the Court of Justice of the European Coal and Steel Community in conformity with article 42 of the Treaty creating the Community, all controversies which could arise between them concerning the interpretation or the performance of this contract."

In this connection see Blondeel and Van der Eycken, "Les Emprunts de la Communauté Européenne du Charbon et de l'Acier," La Revue de la Banque (Belgium), (1955) 249, 283.

[60] See, e.g., Loan Agreement between Belgium and France, September 7, 1949, 123 U.N.T.S. 15; Loan Agreement between Belgium and the United Kingdom, September 7, 1949, 106 U.N.T.S. 61; Agreement between the United Kingdom, Australia, India, Pakistan, and Ceylon, on the one hand, and, on the other, Burma respecting a loan of £6 million to be made by the five Commonwealth governments to Burma June 28, 1950, 87 U.N.T.S. 153; Financial Agreement between the United Kingdom and France, March 27, 1945, 98 U.N.T.S. 227, with a Supplementary Agreement of April 19, 1946, 98 U.N.T.S. 123.

[61] 19 U.N.T.S. 43.

[62] T.I.A.S. 2945.

When jurisdictional clauses are contained in intergovernmental loans, these clauses generally provide for the settlement of disputes by arbitration[63].

The above observation applies to loans between governments and international organizations such as the I.B.R.D. Arbitration clauses are, for example, found in the 1956 loan made by the Swiss Confederation to the I.B.R.D.[64] and in loans made by the latter organization to its member governments. As in the case of loans made by the I.B.R.D. to private borrowers with the guarantee of a member government, disputes arising out of loans made directly by the I.B.R.D. to a member government are to be settled by arbitration[65]. Because it is not the I.B.R.D. practice to request any security for loans to member governments, no opportunity has arisen yet to insert in such loans any multiple jurisdiction clause similar to those which have been included in loans to private borrowers secured by a pledge or mortgage. Arbitration under loans to member governments is, therefore, the exclusive method of settling loan disputes between such governments and the I.B.R.D.

When a loan between subjects of international law is secured by a pledge, mortgage, or other security arrangement, it might be expected that the need to settle the jurisdictional issues connected with the enforcement of the security, in addition to jurisdictional issues connected with loan disputes in general, would result in the stipulation of multiple jurisdiction clauses. So much the more when the property charged as security is situated in a territory under the jurisdiction of a government which is not a party to the loan agreement. Yet no such provision is found in the recent loan from the United States of America to the High Authority of the E.C.S.C., although the High Authority's obligations are secured by a pledge with the B.I.S. of obligations owed to the High Authority by its own borrowers. This situation does not necessarily mean, however, that the jurisdictional issue has been overlooked by the drafters of the documents related to that loan. Because of the detailed covenants of the Act of Pledge between the High Authority and the B.I.S. of Novem-

[63] See, e.g., award of June 10, 1955, Gouvernement Hellénique v. Gouvernement Britannique, Affaire des "Cargaisons Déroutées," Rev. 1956, 278. See also Simpson, "The Diverted Cargoes Arbitration," 5 Int'l & Comp. L.Q. (1956) 471.

[64] Article 9 of the Loan Agreement provides: "Any dispute between the Confederation and the Bank concerning the application or interpretation of this Agreement or of any supplementary arrangement or agreement which is not settled by negotiation shall be submitted for decision to a board of three arbitrators of whom the first shall be appointed by the Federal Council, the second by the Bank, and a presiding arbitrator by agreement of the contracting parties or, if they shall not agree, by the President of the International Court of Justice, unless in any specific case the parties agree to resort to a different mode of settlement."

[65] Loan Regulations No. 3, dated June 15, 1956, Article VII, Section 7.03.

ber 28, 1954, and the Supplemental Agreement between the High Authority and the Export-Import Bank, acting as agent of the United States Government, of December 16, 1954, jurisdictional difficulties appear extremely unlikely. Indeed, the respective relations between the lender and the borrower, on the one hand, and, on the other, between either of them and the pledgee are so precisely defined as practically to eliminate any possibility of litigation in respect to the enforcement of the security[66].

Conclusion

There is a wide area of similarity between the conclusions which can be derived from this survey of lenders' practice and those which have been inferred from a previous study of the means to avoid conflict of laws problems in international loans.

In the field of private international lending, the established practice of inserting into the loan documents exclusive or multiple jurisdiction clauses seems adequate enough to meet most of the difficulties which might otherwise arise from complex and somewhat divergent rules of jurisdiction.

In the field of intergovernmental loans or loans between governments and international organizations, classical remedies, with a special emphasis on arbitration, may be resorted to and are increasingly provided for in loan contracts.

In the jurisdictional field, as in the field of conflict of laws, the real difficulty centers on loans between persons subject to different legal orders, i.e. between private persons on the one hand, and, on the other, governments or international organizations. The confusion created in this field by the doctrine of sovereign immunity has prevented the practice of avoiding jurisdictional issues by stipulation from developing to the point of furnishing a general solution. Yet, the recent evolution of the concept of sovereign immunity can be expected to increase the frequency of jurisdictional clauses not only in those countries like Switzerland which uphold the binding character of such clauses, but also in countries like the United States of America in which the irrevocable character of waivers of immunity is still a matter of controversy. Another factor of increasing importance is that international organizations, at least in regard to their own borrowing, are less reluctant than governments to submit to the jurisdiction of the lenders' courts whenever it appears that such a sub-

[66] As to these provisions, see Blondeel and Van der Eycken, *loc. cit.*, La Revue de la Banque, 249, 265 *et seq.* (1955). Another example of a loan secured by pledge is that of the 1930 Loan from the Bank for International Settlements to the Bank of Spain guaranteed by a pledge of gold deposited with the Bank of England. See Hamel, "Les Formes Internationales des Crédits Bancaires," 51 Recueil des Cours, Hague Academy, (1935) 207, 228.

mission may facilitate the sale of their bonds or the raising of funds needed for their operations.

Together with these recent developments of jurisdictional clauses, a trend to encourage the settlement of disputes by way of arbitration is also noticeable. Submission to arbitration, which has been hailed as the best method to settle international loan disputes, especially between persons subject to different legal orders, is not altogether an innovation. Several precedents can be found either at the turn of the century or during the interwar period[67]. Recent loans, however, give to arbitration an unprecedented significance. In this respect, the lending practice of international organizations is largely responsible for the development of arbitration provisions. In addition, private lenders as well as governments have apparently become more conscious of the many advantages of arbitration in the settlement of international loan disputes. Either by way of express stipulations in loan agreements, or by statutory enactments, arbitration is viewed with increasing favor[68]. Whether this new attitude towards arbitration will possibly result in the creation of some international loans tribunal, as was once recommended by the Finance Committee of the League of Nations[69], remains to be seen.

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[67] See *supra* note 11.

[68] See *supra* notes 9 to 12.

[69] League of Nations, Report of the Committee for the Study of International Loans (Publication No. C 145, M 93, 1939, II.A., section 92 and Annex IV). See also, International Institute for the Unification of Private Law, Unification of Law (1947–1952), vol. III (1954), p. 65. Comp. the Resolution of the International Law Association on state immunity, (ii), (a), Report of the 55th Conference 1952 (1953), p. vii; the Resolution of the American Bar Association favoring the creation of an International Trade Tribunal, 1 Arb. J. (NS) 388 (1946); Coudert and Lans, "Direct Foreign Investment in Underdeveloped Countries: Some Practical Problems," 11 Law and Contemporary Problems, (Summer 1946) 758; Watrin, Essai de Construction d'un Contentieux International des Dettes Publiques (1929), p. 72; Domke, "The Settlement of International Investment Disputes," 12 The Business Lawyer (1957) 264.

J. W. DAVIES* AND B. D. INGLIS†

Divorce, The Royal Commission, and the Conflict of Laws

THE NEW ZEALAND Legislature has always shown a considerable interest in the problems surrounding the law of divorce and matrimonial causes. Since the turn of the century hardly a decade has gone by without legislative activity in this field, usually of some significance,[1] and in view of the recent important recommendations of the English Royal Commission of Marriage and Divorce[2] further activity can possibly be anticipated.[3]

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[1] The Divorce and Matrimonial Causes Act 1867, the first New Zealand legislation in this area, was substantially copied from the English Divorce and Matrimonial Causes Act, 1857. The Divorce Act 1898 contained the important statutory provision of domicil as the basis of divorce jurisdiction. The Divorce and Matrimonial Acts Compilation Act was passed in 1904, followed by an amending Act in 1907. In the following year the law was consolidated in the Divorce and Matrimonial Causes Act 1908, followed by further short Acts in 1912 and 1913, amendment Acts in 1919 and 1920, and the short 1921–22 Act. In 1928 the principal statute now in force was passed, and was not only a consolidating measure, but embodied certain significant changes in the law. Further amendments, or other Acts affecting the operation of the principal Act, were passed in 1930, 1932 (the National Expenditure Adjustment Act), 1936 (the Statutes Amendment Act and the Law Reform Act), 1947 (the Matrimonial Causes (War Marriages) Act), and 1953.

[2] Report of the Royal Commission on Marriage and Divorce (1951–1955), Cmd. 9678, presented to the United Kingdom Parliament in March 1956.

[3] It should be said at this stage that the emphasis in this article on New Zealand legislative activity is not, as might be thought, due entirely to an excess of patriotism on the part of one of the writers. It will be appreciated that although the Legislatures of the British Commonwealth countries have not hesitated to diverge from the common law when it has been considered that local conditions and *mores* have warranted such a departure, legislative activity in England is always watched with keen interest, and frequently followed by similar activity among the Commonwealth Parliaments. It is clear enough from the report of the Royal Commission what the significance of its recommendations are *qua* English law, but it is not clear what the effect of their adoption in other Commonwealth countries might be. The Australian and New Zealand legislation on divorce and matrimonial causes has diverged considerably from the common law, and indeed the New Zealand legislation has gone considerably further than the corresponding English legislation and most other Commonwealth legislation. Our purpose, therefore, is to consider the Commission's recommendations in the light of what can be classed as reasonably representative Commonwealth law in this field.

One of the most significant sections of the Report is that dealing with jurisdiction in divorce cases and recognition of foreign divorce and nullity decrees,[4] and the Draft Code on Jurisdiction and Recognition annexed to the Report as an Appendix.[5]

This is one field in the conflict of laws in which the questions raised are of some difficulty, and it is one of the purposes of this paper to examine the Draft Code in the light of the existing New Zealand law. This is not only because the Draft Code suggests some valuable amendments, although failing to remove some of the difficulties in the existing law and creating some new ones, but especially because some of the more recent legislation in the field of divorce and the conflict of laws has not been outstandingly successful in making the law any less complex.[6]

The first Part of the Draft Code makes provision for the jurisdiction of the Court, and some of the provisions in section 1 of the Code as to the bases of jurisdiction are sufficiently novel to call for comment.[7]

The first question raised before the Commission was that of domicil as the sole basis of jurisdiction in divorce. In dealing with this question, the Commission was assisted by the recent Report of the Standing Committee on Private International Law,[8] which fully investigated the problems raised by this topic. It was contended before the Commission, and accepted by them, that undue hardship resulted from a rigid adherence to domicil as the basis of jurisdiction,[9] not only because of the peculiari-

[4] *Ibid.*, paras. 772–919.

[5] *Ibid.*, Appendix IV, pp. 394–396.

[6] In particular ss. 3 and 10 of the New Zealand Divorce and Matrimonial Causes Amendment Act 1953. For detailed comment on these sections, see notes by Braybrooke, 4 International and Comparative Law Quarterly (1955) 209, and Inglis, 31 N.Z.L.J. (1955) 343.

[7] Section 1 reads:

> The Court shall have jurisdiction to entertain proceedings for divorce if
> (*a*) the petitioner is domiciled in England at the commencement of the proceedings, or
> (*b*) the petitioner is in England at the commencement of the proceedings and the place where the parties to the marriage last resided together was England, or
> (*c*) the parties to the marriage are both resident in England at the commencement of the proceedings:
> Provided that the court shall not grant a decree of divorce in the exercise of jurisdiction under sub-paragraphs (*b*) or (*c*) unless (i) the personal law or laws of both the parties recognise as sufficient ground for a divorce or nullity of marriage a ground substantially similar to that on which a divorce is sought in England, or (ii) the personal law or laws of both the parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground.

[8] Cmd. 9068.

[9] Report, paras. 791. ff. "The major criticism [of the basis on which divorce jurisdiction is at present exercised] was that the jurisdiction is too restricted, because of the excessive emphasis placed by English. . . law on the factor of domicil. It was said that hardship also results from the strict view taken of the concept of domicil": *ibid.*, para. 791. It will, of course, be remembered that in English and New Zealand law a person acquires and retains a domicil of

ties of the English law of domicil,[10] but also because of the dependency of the wife's domicil on that of her husband.[11] The Commission therefore stated that, while it considered that domicil should continue to be the main basis of jurisdiction, there should be some relaxation of the strict requirements of the law in order to bring it into line with that of other countries. There should, the Commission recommended, be jurisdiction to grant a decree based on a simple residence qualification which "would in our view greatly assist those persons who have to live in England or Scotland for some time but have no intention of becoming domiciled therein."[12]

Residence alone has never been a sufficient basis of jurisdiction in either England or New Zealand,[13] but statutory relaxations of the strict requirements of domicil have been made in both countries in cases where the wife is the petitioner.[14] The main criticism usually advanced against

choice only when he is actually resident in a country, with intention to remain there permanently: Winans v. Attorney-General [1904] A.C. 287 and Ramsay v. Liverpool Royal Infirmary [1930] A.C. 588 are not only two of the leading cases, but are also examples of the extremes to which the law on this point has been taken.

[10] See Report, particularly para. 793.

[11] *Ibid.*, para. 796. The English legislation (Matrimonial Causes Act, 1950, s. 18 (1) (*b*) is much less far-reaching in this respect than the corresponding New Zealand legislation: cp. Divorce and Matrimonial Causes Act 1928, s. 12 (as amended by s. 9(2) of the Divorce and Matrimonial Causes Amendment Act 1953).

[12] Report, para. 811.

[13] Although in England mere residence of both parties is sufficient to found jurisdiction in nullity suits: Ramsay-Fairfax v. Ramsay-Fairfax [1956] P. 115, (C.A.); and presumably this would be the position in New Zealand without s. 10B of the divorce and Matrimonial Causes Act 1928 (as enacted by s.3 of the Divorce and Matrimonial Causes Amendment Act 1953). In the light of this amendment, mere residence will apparently suffice if the marriage had been celebrated in New Zealand: s.10B(1) (b).

[14] In New Zealand the relevant provision is s.12(4) of the Divorce and Matrimonial Causes Act 1928 (as enacted by s.9(2) of the Divorce and Matrimonial Causes Amendment Act 1953), which provides that a period of three years' residence, together with the intention to reside permanently in New Zealand, shall be a sufficient basis of jurisdiction where the petitioner, being the wife, is living apart from her husband. However, a deserted wife whose husband was domiciled in New Zealand at the time of desertion is deemed to have retained her New Zealand domicil notwithstanding that since the desertion her husband has acquired some other domicil: s.12(1); and where the ground of divorce is an agreement for separation or a judicial separation, or seven years' separation without agreement or a judicial separation order, and the husband was domiciled in New Zealand at the time of the commencement of the separation, the wife is deemed to have retained her New Zealand domicil, notwithstanding that the husband has since acquired some other domicil: s.12(2) and (3). Contrast the terms of s.18(1) of the English Act: ". . . the court shall. . . have jurisdiction to entertain proceedings by a wife [in certain defined cases] . . . notwithstanding that the husband is not domiciled in England. . . if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.

the relaxation of the domicil basis of jurisdiction is that it encourages what is colorfully known in the United States as forum-shopping, and tends to limit foreign recognition of the resulting decree.[15]

It may be said that these objections have been met by the Commission by their proviso to section 1 of the Draft Code, in which it is recommended that a decree of divorce should not be pronounced under subparagraphs (*b*) and (*c*) of the section unless the personal law or laws of both parties recognize as sufficient ground for divorce or nullity of marriage a ground substantially similar to that on which a decree is granted in England, or the personal laws of both parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground. This provision was also intended to assist in what the Commission regarded as one of the main difficulties in this branch of the law, namely the lack of reciprocity in the recognition of decrees.[16]

The recommendation, however, is especially interesting because it is the first attempt in either English or New Zealand law to consider the question of choice of law in domestic divorce jurisdiction. English courts have invariably disregarded whatever grounds of divorce might be available to the parties in their own country, and have always applied English bases of jurisdiction in divorce causes heard by them, even when jurisdiction is claimed under the statutory three-year residence period.[17]

Prior to the adoption of residence, or, in the case of New Zealand, "deemed" domicil as a basis of jurisdiction in the enactments now contained in s.18 of the English Matrimonial Causes Act, 1950 and s.12 of the New Zealand Divorce and Matrimonial Causes Act 1928 respectively, the problem of choice of law in divorce jurisdiction could not, except in a purely academic sense, be said to arise. The law of the forum was certainly applied, but since the parties to the suit were of necessity domiciled in the forum, it was arguable whether it was applied *qua lex fori* or *qua lex domicilii*. With the passing of these Acts it was clear that English and New Zealand law were to be applied quite irrespective of the domicil of

[15] Compare the statement of Hitz, A. J., in Holt v. Holt, 77 F. (2d) 538, 541, (1935) (U.S. Court of Appeals for the District of Columbia), on the subject of Nevada Divorces: "Since control of the matrimonial status lies in the law of the domicile of the parties to the marriage, the decrees so casually granted by a few of our states to sojourners, tourists, and birds of passage have no extra-territorial validity or effect in the District of Columbia under the Constitution. And while it is probably true that a law of divorce like our own, which is based on adultery only, is now neither adequate nor appropriate to the life of the community, and tends to produce a train of perjury, bigamy, and bastardy, yet the constitutional rule is not to be relaxed by the courts, though the evil may be recognized and corrected by the Legislature whenever it sees fit to do so."

[16] See Report, para. 828.

[17] See s.18(3) of the Matrimonial Causes Act, 1950 (U.K.).

the parties. It is hardly necessary to point out that this position is inconsistent with the generally accepted principle that questions of status are governed by the personal laws of the parties, and it is gratifying to see it urged that this branch of the law be brought more nearly into line in this regard. It is possibly desirable that English and New Zealand courts should apply their own law, but it is also desirable that due consideration be given to the principles of the appropriate foreign law.[18]

However, references to the personal laws of the parties raise problems as to the scope and extent of those laws. This uncertainty is, of course, always present in any conflict of laws case, but it is particularly serious here; firstly because of the problem of *renvoi*, and secondly because of the nature of the Commission's recommendations, particularly the second part of the proviso to section 1 of the Draft Code, in which the courts are required to consider not only whether the foreign law has a ground substantially similar to the law of the forum, but also whether the personal law of the parties would permit the petitioner to obtain a divorce in the circumstances of the particular case on some other ground. In the sense that the Court would be required to consider not only the foreign law, but also the interpretation which would be put on all the facts and circumstances of the case by the foreign court according to its own law, this would require an English or a New Zealand court to sit literally as a foreign court on the case. It is one thing to apply the princi-

[18] Indeed, it was on this type of reasoning that the view that domicil was the proper basis of jurisdiction was founded. It was said by Lord Penzance in Wilson v. Wilson, (1872), L.R 2 P.and D. 435,442, that "the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunal which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another." Six years later, in Niboyet v. Niboyet (1878), 4. P.D. 1, 13, Brett, L.J., expressed a similar view: "It seems that the only court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married or the status of either of such parties arising from their being married on account of some act which by law is treated as a matrimonial offence, is a court of the country in which they are domiciled at the time of the institution of the suit." The views expressed by Lord Penzance in Wilson v. Wilson (*supra*) were concurred in "without reservation" by the Privy Council in Le Mesurier v. Le Mesurier [1895] A.C. 517, 540. It is as difficult to deny the force of the above reasoning, as it is to deny that the English test of domicil lacks nothing in certainty. The question appears to be whether it is more desirable to have certainty, or to sacrifice a certain degree of certainty for the rather doubtful value of providing a forum for persons who are, for some reason or other, unable to take advantage of their own. For further comment on this point, see text, *post*, p. 222.

ple in *Travers* v. *Holley*[19] to provide that a foreign divorce on a wife's petition will be recognized if an English or New Zealand court would take jurisdiction in substantially similar circumstances, the grounds themselves being irrelevant, but another thing to attempt to apply the principle as it were in reverse by granting decrees on grounds substantially similar to those adopted in the country of the proper law, the foreign jurisdictional basis being irrelevant.

A further difficulty, and one always encountered in conflict of laws cases, is in obtaining expert evidence of foreign law. While it is usually comparatively simple to obtain a reliable statement of what may best be described as the foreign statutory or case-law background, it is extremely difficult to obtain reliable expert testimony on what the appropriate foreign courts would actually do were a particular case to come up before them.[20] It is this more particularized evidence which the proviso to section 1 of the Draft Code appears to be aimed at obtaining; the production of a certificate as to the appropriate foreign law by an official of the appropriate foreign embassy, which is advocated by the Commission as admissible evidence of foreign law[21] and which would in practice possibly be the only evidence adduced, appears entirely inadequate to meet the situation.

A whole section of the Commission's Report is devoted to the question of how the personal law of the parties is to be determined,[22] and the Commission's recommendations may be summarized as follows: The English court is first directed to the law of the domicil, and if the courts of that country recognize that questions of personal status are governed

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[19] [1953] P. 246 (C.A.)

[20] The classic example of this difficulty is In re Duke of Wellington [1947] Ch. 506, in which Wynn-Parry, J., was moved to say (*ibid.*, 515):

> As regards Mr. Valls and Dr. Colas, they were most satisfactory as [expert witnesses on Spanish law]; each made plain his conclusions; each made plain the reasons for his conclusions; the difficulty arises from the circumstances, first, that, as they both agreed, there is no express provision in the Spanish Civil Code, nor any express decision of the Supreme Court, on the question of the applicability of the doctrine of renvoi in Spanish law, and secondly, that on this matter they arrived at diametrically opposed conclusions. The task of an English judge, who is faced with the duty of finding as a fact what is the relevant foreign law, in a case involving the application of foreign law, as it would be expounded in the foreign court, for that purpose notionally sitting in that court, is frequently a hard one; but it would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of courts of inferior jurisdiction.

[21] Draft Code, section 10.

[22] Report, paras. 836–839.

by the law of the domicil, then the court should regard the domestic law of that country as the personal law of the spouse.

But if, as is frequently the case, the law of the domicil as determined by English law refers questions of personal status to the law of the nationality, then the English court is bound to refer to the law of the nationality. If that law would also apply the law of the nationality to a question of this kind, then the English court stops there; if, on the other hand, the law of the nationality refers the question to the law of the domicil, we are in the *circulus inextricabilis* of the text-book writers. The Commission cuts the Gordian knot by providing that in this last case a specific choice of law rule should be adopted and the law of the domicil applied.[23]

This at first sight seems to be a simple solution to a difficult problem, but it should be noted that the Commission is in effect advocating the adoption of a statutory theory of partial *renvoi*, and not what is usually referred to as the foreign court theory,[24] which has so far been applied in England in every case in which a question of *renvoi* has arisen. Accordingly, what the court is asked to do is to apply the foreign law, not as the foreign court would actually apply it in the very circumstances of the case, but on the purely artificial basis of what the foreign court would do assuming that it agreed with the Commission's view of *renvoi*. The result may be that, insofar as the court is referred to foreign law without in the ultimate result finding out what the foreign court would do in the particular case, the certainty of applying English or New Zealand law may be sacrificed without the achievement of the uniformity to which the foreign court theory ultimately leads.[25]

[23] Draft Code, section 9, which reads:

(1) For the purposes of this part of the Code, the personal law of a party shall be:
(*a*) the domestic law of the country in which that party is domiciled, if, under the rules of private international law of that country, questions of personal status are governed by the law of the country in which a person is domiciled; failing which
(*b*) the domestic law of the country of which that party is a national, if, under the rules of private international law of that country, questions of personal status are governed by the law of the country of which a person is a national; failing which
(*c*) the domestic law of the country in which that party is domiciled.
(2) Where the court is required under subsection (1) (*b*) above to look to the law of a party's nationality and he has more than one nationality, he shall be taken to be a national of that country in which he is also domiciled, or, failing that, a national of that country of which he last became a national.

[24] For an explanation of these terms, see Dicey, Conflict of Laws, 6th ed., (1949) 49ff.

[25] This is particularly unfortunate since the only justification for any form of *renvoi* is uniformity of result, both in the forum and the appropriate foreign country. Also on this general question, see Professor E. M. Meijers, "La Question du Renvoi," 38 Bulletin de l'Institut Juridique International (1938) 191, especially at 228. Professor Meijers approaches the problem from the point of view of those countries which adopt nationality as a connecting

Further, in its references to domicil under this provision, the Commission has not made any reference to the possibility that domicil may be differently defined in the forum and what the forum regards as the country of the personal law.[26] This question was adverted to by the Standing Committee on Private International Law, and it is submitted that it is capable of raising conflicts just as serious as those between the laws of domicil and nationality.[27]

In short, section 1 of the Draft Code appears to be a well-meaning attempt both to relax some of the rigidities existing in the present law, and to clarify it. The major defect is that it abandons the certainty of the present bases of jurisdiction in favor of a complex mass of choice of law rules without achieving the uniformity which theoretically would result from the adoption of the foreign court theory. It occupies the middle line between an adherence to the law of the forum in favor of the rules the appropriate foreign court would apply were it seized of the particular case. If certainty is desired, the former is to be preferred. If complete reciprocity is desired, despite the considerable difficulties encountered in the field of expert evidence on what the foreign court would in fact do, probably the latter is the one to be adopted. The middle position chosen by the Commission appears to substitute one set of fairly rigid rules with another, without achieving either the certainty or the uniformity which it appeared to desire to embody in its Draft Code. Whether it is more desirable to sacrifice certainty for the rather doubtful value of providing a forum for persons who are, for some reason or other, unable to take advantage of their own, appears to be a question which, in New Zealand at least, can have only one clear answer. It is submitted that there is no sufficient reason why the existing rule of domicil as modified by statute should be abandoned.

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factor. See also the provisions of the Draft Convention to Determine Conflicts between the National Law and the Law of Domicile, a product of the VIIth Hague Convention on Private International Law, reproduced in full in 1 Am. Journ. Comp. L. (1952) 280–281. A comment on the Benelux Convention containing similar provisions by Professor Meijers may be found in 2 Am. Journ. Comp. L. (1953) 1, especially Pp. 2–3.

[26] The Commission did, however, make one oblique reference to this difficulty: Report, para. 850; when dealing with the question of domicil as the basis of recognition of foreign decrees, recommending "that the court should not require that the concept of domicil in the country in question should exactly correspond to the English and Scottish concept, bearing in mind that in many countries domicil is equivalent to habitual residence." The Commission does not make it clear how close a correspondence is required, and as it stands the recommendation would compel recognition of a decree granted on the basis of mere habitual residence without the Commission's proviso that the personal law of the parties be applied. This is hardly reciprocity.

[27] As in fact it did in In re Annesley [1926] Ch. 692.

Section 2 of the Draft Code provides that in addition to the jurisdiction conferred on the court under section 1, the court is to have jurisdiction to entertain proceedings for divorce "if the petitioner is a citizen of the United Kingdom and Colonies and is domiciled in a country, the law of which requires questions of personal status to be determined by the law of the country of which the petitioner is a national and does not permit divorce to be granted on the basis of the petitioner's domicil or residence."

The difficulty the Commission sought to remove was that arising where an Englishman or Scotsman, who has grounds for divorce under the law of England or Scotland, is domiciled in a country whose law does not permit him to take divorce proceedings. Uniformity is obtained not by the invention of a choice of law rule at the jurisdictional stage, but by reference to the choice of law rule of the country of the petitioner's domicil, where the law of such country refers to the petitioner's national law. Accordingly, if an English court were in such circumstances to assume jurisdiction and grant a decree, the law of the country in which the petitioner is domiciled, by referring to the law of the petitioner's nationality, would be obliged to recognize the validity of the divorce.

It is conceivable, however, that in considering the above provision the Commission overlooked the difficulty raised by the decision in *In re O'Keefe*,[28] and, further, there appears little reason why the privilege conferred by section 2 should be conferred only on petitioners fortunate enough to be domiciled in a country where the choice of law rule as to status indicates national law as the law to be applied. Article 185 of the Civil Code of Lower Canada prevents a petitioner domiciled in Quebec from obtaining a divorce *a vinculo*; there appears no substantial reason for drawing a distinction between an English or Scottish citizen domiciled in Quebec, and one domiciled in, e.g., Italy. The further question may be asked, whether the provision is really necessary. It is true that to a few British nationals domiciled overseas there may be some hardship in not being able to obtain a divorce in the country of their domicil; this might, however, be regarded as a matter such persons should have considered before acquiring their foreign domicil. Nor is it clear why the courts should be asked to concern themselves in this manner with nationals of England or Scotland who have, presumably voluntarily, acquired a foreign domicil.

Prior to 1954, the jurisdiction of the Supreme Court of New Zealand to entertain proceedings for declaring a nullity any marriage alleged to

[28] [1940] Ch. 124.

be void was found in the common law.[29] On January 1, 1954, however, s.3 of the Divorce and Matrimonial Causes Amendment Act 1953 came into force.[30] The position is now confused.[31] It is possible to read the new section as providing for certain specified cases in which the court may exercise jurisdiction, while at the same time preserving the common law jurisdiction in cases not covered by the section. But the section can also be read as an exhaustive code providing for jurisdiction in nullity suits in a restricted class of cases which is by no means exhaustive of possible fact-situations likely to arise especially in regard to foreign "marriages."[32] In view of this doubt and difficulty it is necessary to consider the provisions of the Draft Code with particular care.

Section 4 provides that the court shall have jurisdiction in respect of a marriage alleged to be void if the petitioner is domiciled in England at the commencement of the proceedings, or if the petitioner is in England at the commencement of the proceedings. It is not easy to say how far these recommendations would change the existing English law, because,

[29] See Dicey, Conflict of Laws, 6th ed., 245 ff; Sim's Divorce Law and Practice in New Zealand, 5th ed., (1943) 85.

[30] This is now s.10B of the Divorce and Matrimonial Causes Act 1928.

[31] See Inglis, "Annulment of Foreign Marriages and Recognition of Foreign Divorces," 31 N.Z.L.J. (1955) 343.

[32] Section 10B deals with both void and voidable marriages, and provides (subs. (1)) that a petition for nullity "on any of the grounds specified in subsections two and three of this section may be presented to the Court in either of the following cases, and in no other case," firstly, where either the petitioner or the respondent is domiciled in New Zealand at the commencement of proceedings, or secondly, where the marriage was celebrated in New Zealand. Subs. (2) provides that a marriage shall be void *ab initio* "where any of the following grounds exist, and in no other case," the grounds being that at the time of the ceremony either party was already married; absence of consent due to duress, mistake, or insanity, or otherwise; that the marriage "is declared to be void by section nine of the Marriage Amendment Act 1946" (relating to the prohibited degrees); and that the marriage was not solemnized in due form. It will be observed that if the subsection is read literally, there is apparently no way in which the court can declare a "marriage" of the type considered in *Sottomayor* v. *de Barros* (1) (1877) L.R. 3 P.D. 1 (C.A.) void, as the parties in that case, although within the prohibited degrees according to the law of their domicil, were not within the degrees specified in the Marriage Amendment Act. Subs. (2) of section 10B provides that "a marriage shall be voidable on any of the following grounds, and on no other ground," the grounds being non-consummation; that either part was at the time of the marriage "a mentally defective person within the meaning of the Mental Defectives Act 1911" although capable of consenting to the marriage; that either party was suffering from communicable venereal disease; and that the wife was at the time of the marriage pregnant by some person other than the petitioner. In the last three cases, however, the court may not grant a decree unless it is satisfied that the petitioner was at the time of the ceremony ignorant of the facts alleged, that proceedings were instituted within a year of the marriage, and that marital intercourse with the consent of the petitioner has not taken place since the existence of the grounds for a decree. There is no corresponding provision in the English statutes.

as the Commission remarks,[33] the existing English law governing jurisdiction in nullity is not clearly defined. This is particularly so with respect to marriages alleged to be void,[34] and it is a major point in favor of section 4 that it provides a comprehensive set of rules governing the question. The chief consideration in regard to void marriages, as distinct from those which are merely voidable, is that a declaration of nullity of such a marriage is in no sense a declaration of a change of status. It is, for instance, well settled that any member of the public in his dealings with the parties to a void marriage may rely on its nullity without the necessity of a judicial decree, and if the question whether a marriage is void arises incidentally in other proceedings, there are no jurisdictional limits on the power of the court to make a declaration as to the nullity of the marriage.[35] For this reason, it has even been argued[36] that there are no limits under existing English law to the jurisdiction of the English courts over void marriages. It is, therefore, difficult to see what objections could be taken to the liberal rules recommended by the Commission, or their suggested choice of law rules as a limiting factor on the exercise of jurisdiction,[37] which are of interest, since there has been a tendency for our courts to apply their own law in all nullity suits coming before them, without the jurisdictional justification which existed with respect to divorce.[38] The Commission draws a distinction between formal or "contractual" defects, governed by the law of the place where the marriage

[33] Report, para. 880.

[34] Domicil of both parties is of course a sufficient ground of jurisdiction. A Northern Ireland decision, Mason v. Mason [1944] N.Ir. 134, recognized residence of both parties as sufficient, and in view of Ramsay-Fairfax v. Ramsay-Fairfax [1956] P. 115 (C.A.) this is presumably correct. Domicil of the petitioner has been held to be sufficient in White v. White (*supra*), but this was disapproved (*obiter*) by the Court of Appeal in De Reneville v. De Reneville [1948] P. 100, 117, per Lord Greene, M.R. A number of old cases assumed jurisdiction on the ground that the marriage was celebrated in England: e.g., Simonin v. Mallac, (1860), 2 Sw. and Tr. 67; Sottomayor v. de Barros (1), (1877), 3 P.D. 1 (C.A.). See also Matrimonial Causes Act, 1950 (U.K.), s.18.

[35] Report, para. 882.

[36] J. H. C. Morris, Cases on Private International Law, 2nd ed., (1952) 141–2.

[37] The relevant portions of section 4 read:

(2) If the marriage is alleged to be void on the ground of lack of formalities, that issue shall be determined in accordance with the law of the country in which the marriage ceremony took place.

(3) If the marriage is alleged to be void on a ground other than that of lack of formalities, that issue shall be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties); Provided that a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out.

[38] *Supra*, p. 218.

was celebrated,[39] and "personal" defects, which are to be referred to the personal law of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties). The former rule should give little difficulty, but the latter, while an improvement on the complex simplicities of s.10B of the Divorce and Matrimonial Causes Act 1928, is open to the same objections as those raised with respect to divorce, since the rules for determining the personal law of the parties are also applicable here. The difficulties are, if anything, even more formidable, since in many cases not one but two personal laws will have to be ascertained. However, the personal laws of the parties are only necessarily controlling in the case of a marriage alleged to be void where the marriage was celebrated in England or Scotland, since under the proviso to section 4(3), where the marriage was celebrated elsewhere, it is not to be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home, and such intention has in fact been carried out.[40] This is a departure from the orthodox rule,[41] and it seems necessarily to involve the proposition that parties can confer capacity to marry on themselves by choosing an appropriate matrimonial home. It may be, however, that this is more a theoretical than a practical objection, and there is certainly something to be said for the view that the country with the greatest interest in the validity of a marriage is that in which the parties to it have set up their home.

But if this view is adopted, it is regrettable that the Commission should have found it necessary to confine it to marriages celebrated outside England and Scotland. Marriages celebrated in Great Britain will have to conform to stricter requirements in order to be upheld than those

[39] Draft Code, section 4(2).

[40] It is interesting to note that Dr. G. C. Cheshire was co-opted on to the sub-committee of the Royal Commission which considered problems in the conflict of laws.

[41] This is, of course, usually stated as the proposition that each party must have capacity by the law of his or her domicil to marry the other: see, e.g., Brook v. Brook (1861) 9 H.L.C. 193; Sottomayor v. de Barros (1), (1877) L.R. 3 P.D. 1 (C.A.). Sottomayor v. de Barros (2) (1879) 5 P.D.94, and the only other later case in point suggest, however, that the rule may be that each party must have capacity to marry the other by the law of the *husband's* domicil: see, e.g., Pugh v. Pugh [1951] P.482. The "intended matrimonial home" doctrine, in the present state of the law, can hardly be taken seriously: the only dicta which can be said to amount to anything approaching judicial recognition of it appear in De Reneville v. De Reneville [1948] P.100 (C.A.), per Lord Greene, M.R., at 114, and Bucknill, L.J., at 122, and in Kenward v. Kenward [1951] P.124, 144, per Denning, L.J. There are also certain very inconclusive dicta of Lord Campbell in Brook v. Brook, *supra*, at 207.

celebrated elsewhere, which implies an exclusive treatment of English marriages inappropriate in the conflict of laws.[42]

The main objection to the proviso, however, must be on the grounds of certainty. It has already been pointed out that the main advantage of section 4 is that it provides certain rules for questions in which, on the present law, certainty is conspicuously lacking. This advantage will be largely nullified if the rules can only be applied after a prolonged investigation into the question of the *situs* of the matrimonial home and, especially, the intention of the parties at the time of the marriage. As to the former, presumably some sort of evidence as to habitual residence will be required, or perhaps there will be a presumption that the matrimonial home is the country of the husband's domicil.[43] But it is submitted that the latter question, which is likely to be the more important of the two, is practically insoluble. Concrete evidence of the parties' intentions at the time of marriage must be given, if the rule is not to become merely that the marriage is to be upheld if it is valid by the law of the country where the parties have their home at the time of the proceedings; but in the majority of cases likely to arise it is difficult to see what evidence could be produced.

It might perhaps be desirable in any future legislation to incorporate a statutory choice of law rule for determining the law by which the marriage is regarded as void or voidable. This has always been a major difficulty in nullity suits, and is not, it is submitted, avoided by the suggestion to be drawn from the wording of section 4(3) that the section applies only in cases of marriages "alleged" to be void, as this does not prevent the respondent raising the issue that according to the proper law the marriage is not void but voidable.

Section 5 of the Draft Code deals with voidable marriages, and the court is given jurisdiction if the petitioner is domiciled in England at the commencement of the proceedings or the petitioner is in England at the commencement of the proceedings, and the place where the parties to the marriage last resided together was England, or where the parties to the marriage are both resident in England at the commencement of the proceedings. A proviso to the section states that the court shall not grant

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[42] Compare Sottomayor v. de Barros (2), (1879), L.R. 5 P.D. 94, and Doe d. Birtwhistle v. Vardill, (1826), 5 B. and C. 438. The parties to such a marriage will perhaps be spoken of as "porphyromariti. . . married within the narrowest pale of English matrimony."

[43] See Cheshire, Private International Law, 3rd ed., (1947) p. 277: "The capacity of parties to a marriage is governed by the law of the intended matrimonial home, which shall *prima facie* be deemed to be the lex domicilii of the husband at the time of the marriage." 4th ed., (1952) p. 297: same rule.

a decree of nullity unless the personal law or laws of one or other or both of the parties at the time of the marriage recognized as sufficient ground for nullity of marriage or divorce a ground substantially similar to that on which annulment is sought in England.

It is not necessary to examine these recommendations in any great detail, because the Commission considered that, in its effect on the personal status of the spouses, the annulment of a voidable marriage has the same effect as divorce, and therefore assimilated the jurisdictional requirements under this heading to those laid down for divorce in section 1.[44] It follows that, in general, the comments already made on section 1 of the Draft Code apply also to section 5. There are, however, a few differences which are worthy of mention.

As far as jurisdiction is concerned, it will be seen that section 5 is less revolutionary in the law of nullity than is section 1 in the law of divorce, since, if *Ramsay-Fairfax* v. *Ramsay-Fairfax*[45] is to be regarded as the last word of the common law on the subject, the residence of both parties is already a basis of jurisdiction for the annulment of a voidable marriage. Moreover, the Commission does not recommend the assumption of jurisdiction in nullity on the basis of British citizenship, as is recommended for divorce in section 2, because most, if not all, countries are prepared to assume nullity jurisdiction, and the possibilities of hardship for British citizens domiciled abroad, which the Commission found to exist in the law of divorce, do not arise here. Insofar as the law of the domicil might differ from English law, the Commission was of the opinion that "an Englishman or Scotsman must be prepared to have his rights governed by the law of the country in which he has chosen to become domiciled."[46] With this we respectfully agree, and it has already been submitted that the same argument can be made with equal force on the question of divorce.

The annulment of voidable marriages is further assimilated to divorce in that under the proviso to section 5 English law is to be applied to all proceedings in English courts, provided that the personal law or laws of the parties at the time of the marriage recognized as sufficient ground for nullity of marriage or divorce a ground substantially similar to that on which annulment is sought in England. The relevant foreign law is, of course, foreign law at the time of the marriage, and not, as in divorce, foreign law at the time of the commencement of proceedings. It should be noted, firstly, that the court is not required to consider under section 5

[44] Report, para. 892.
[45] [1956] P. 115 (C.A.)
[46] Report, para. 893.

whether the personal law or laws of the parties "would, in the circumstances of the case, permit the petitioner to obtain a [decree] on some other ground,"[47] which considerably simplifies the problem of proof of foreign law; and, secondly, that there is no exception in the case of marriages not celebrated in England in which the law of the intended matrimonial home is to be applied. The reason given for this is that, while the defects which may make a marriage void are primarily of concern to the community, those which render a marriage voidable are primarily in the interests of the individual.[48] What is even more important, it is submitted, is that almost insuperable difficulties of proof are thus avoided.

This section appears to raise comparatively few difficulties, especially in view of the fact that the Commission has recommended elsewhere[49] that willful refusal to consummate a marriage be made a ground for divorce. The equivalent provisions of the Divorce and Matrimonial Causes Act 1928[50] raise, however, somewhat greater difficulties.

It should be mentioned that the provisions of the present s.10B of the Divorce and Matrimonial Causes Act 1928 are unsatisfactory only insofar as they purport to affect conflict of laws situations. Where the issue is entirely domestic, it can be said with assurance that codification was desirable to bring nullity suits into line with the rest of the Act. But it is submitted, for reasons already stated elsewhere,[51] that whatever else any provisions dealing with jurisdictional bases in nullity and annulment suits contain, no attempt should be made to set out the circumstances in which a foreign marriage should be void *ab initio*, or on which a foreign marriage should be voidable. This is a matter best left to the personal laws of the parties to the marriage, and it is submitted that there is no reason for searching for another solution to the problems raised, when a feasible and workable solution is provided by the common law.[52]

The final recommendation of the Commission on jurisdictional issues concerns the position of the wife as petitioner. Section 6(1) of the Draft Code provides that for the purposes of establishing jurisdiction under sections 1, 3, 4, and 5, a wife who is living separate and apart from her husband is entitled to claim a separate English domicil notwithstanding that her husband is not domiciled in England at the commencement of

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[47] Draft Code, section 1.
[48] Report, para. 897.
[49] *Ibid.*, para. 283.
[50] s.10B(3).
[51] In (1955) 31 N.Z.L.J. 343.
[52] And consult Braybrooke, 4 International and Comparative Law Quarterly, (1955) 209 *et seq.*

the proceedings, provided that in the circumstances, had she been a single woman, the court would regard her as having an English domicil. Subsection (2) of section 6 provides that where a wife who is claiming a separate English domicil was domiciled in England immediately before her marriage or immediately before her separation from her husband, and is resident in England at the commencement of the proceedings, she is deemed to have acquired an English domicil unless there is evidence to the contrary.

It will be noted that there is no substantial difference between these provisions and the provisions of s.12 of the Divorce and Matrimonial Causes Act 1928, apart from the important exception that the three year residence requirement in s.12(4) does not appear in the Commission's recommendations. This seems to have escaped the Commission's attention,[53] although the provision is substantially a re-enactment of s.12(3) of the 1928 Act,[54] and insofar as it provides the New Zealand courts with some measure of protection against invasion by migratory wife-petitioners, its retention in its present form appears desirable.

Consideration of the acquisition of a separate domicil by a wife for the purposes of divorce jurisdiction leads to the difficult question of recognition of foreign decrees of divorce and nullity. When such decrees are granted by the courts of the husband's domicil, no great difficulty arises, but when they are granted by the courts of the wife's separate domicil, or acquired domicil, for the purposes of divorce jurisdiction, the problems which must now be considered are encountered.

At common law, a foreign divorce could not be recognized by a New Zealand court as having effectively dissolved the marriage in question unless the marriage had been dissolved by the courts of the husband's domicil,[55] or if dissolved by the courts of some other country, unless the courts of the husband's domicil would recognize the marriage as having been effectively dissolved,[56] or (*semble*) if granted by the courts of some other country on the wife's petition on the basis of her residence or "deemed" domicil in that country, her husband being at the relevant time domiciled in New Zealand, unless jurisdiction was assumed by the courts of that country on substantially the same basis as that assumed by the New Zealand courts.[57] The only difficulty lay in the fact that a New Zealand husband, by acquiring a domicil in a jurisdiction with

[53] Report, para. 823.
[54] Inserted by s.3 of the Divorce and Matrimonial Causes Amendment Act 1930.
[55] Le Mesurier v. Le Mesurier [1895] A.C. 517.
[56] Armitage v. The Attorney-General [1906] P. 135.
[57] Travers v. Holley [1953] P. 246; but see Dunne v. Saban [1955] P. 178.

much less stringent grounds for divorce was quite capable of obtaining a decree in such a jurisdiction which the New Zealand courts would be obliged to recognize as valid. On the other hand his wife, while her husband was domiciled in New Zealand, could not have the advantage of being able to obtain an easy divorce at the cost of transport to Nevada, six weeks' "domicil" there, and attorney's fees. But if at the time of her petition her husband was domiciled in a country where a Nevada decree based on the wife's domicil in Nevada would be recognized, then it is clear that in New Zealand the marriage would have to be regarded as effectively dissolved.

It must have been thought that this gap in the law resulted in undue hardship to wives who might be desirous of obtaining divorces with as short as possible delay on grounds such as extreme mental cruelty or incompatibility of temperament, because by the enactment of s.12A of the Divorce and Matrimonial Causes Act 1928[58] this gap was effectively closed, as it also is by section 7 of the Draft Code.[59]

It should at this stage be stressed that however desirable it may be to oblige New Zealand courts to recognize divorce decrees of, e.g., Nevada, "so casually granted... to sojourners, tourists, and birds of passage,"[60] and the "bargain counter divorce mills which have been operating for local profit in a few states,"[61] the most serious difficulties can arise in cer-

[58] By s.10 of the Divorce and Matrimonial Causes Amendment Act 1953. The section provides that foreign decrees are to be recognized if the foreign court or legislature has exercised jurisdiction on the basis of the domicil of "one or both" of the parties in the foreign country, or on the basis of the wife's residence for a continuous period of not less than two years, or, in a case of nullity on the ground of non-consummation owing to incapacity or wilful refusal or on some ground existing at the time of the marriage, on the basis of the celebration of the marriage in that country. The court must also recognize a foreign decree if it "is recognized as valid in the Courts of a country in which at least one of the parties to the marriage is domiciled or is deemed by the law of that country to be domiciled." There is no corresponding provision in the English statutes. This section has been fully discussed elsewhere: see 31 N.Z.L.J. (1955) 343, 344–346.

[59] The relevant part of the section reads:

> The court shall recognize as valid a divorce, obtained by judicial process or otherwise,
> (a) which has been granted in accordance with the law of the country in which one spouse was, or both spouses were, domiciled at the time of the proceedings, or which would be given recognition by the law of that country; or
> (b) which has been granted in accordance with the law of the country of which one spouse was a national, or both spouses were nationals, at the time of the proceedings, or which would be given recognition by the law of that country; or
> (c) which has been granted in circumstances substantially similar to those in which the court in England exercises divorce jurisdiction in respect of persons who are not domiciled in England....

[60] Hitz, A. J., delivering the opinion of the U.S. Court of Appeals for the District of Columbia, in Holt v. Holt, 77 F. (2d) 538, 541.

[61] Joseph Dainow, "Policy Considerations in Divorce Jurisdiction and Recognition," 10 Louisiana L. Rev. (1949) 54.

tain cases. For example, W leaves her husband, H, who is domiciled in the State of New York, and obtains a divorce in Nevada. Both W and H come to New Zealand, presumably separately, and each remarries. In some way the question whether the Nevada decree is recognizable comes before the New Zealand courts. Under s.12A, as far as W at least is concerned, the Nevada decree must seemingly be recognized, as it was granted on the basis of W's deemed domicil in Nevada, and would certainly be recognized as valid by the Nevada courts. But the question would also have to be considered, as far as H's position is concerned, whether the courts of the State of New York would be obliged under the United States Constitution to give full faith and credit to the Nevada decree, and, if so, what effect this would have on the wife's position. It is regarded as an indispensable requirement for a decree to be entitled to full faith and credit in other States that at least one of the parties be a *bona fide* domiciliary of the State in which an *ex parte* decree was granted.[62] It is however, clear that the divorce forum's finding of domicil is unassailable in any other State when the defendant participated in the divorce proceedings,[63] which, in the case of migratory or tourist divorces, is not often: as an eminent American authority on family law has pointed out,[64] "In cases of migratory divorce, it has thus been necessary for the plaintiff to swear that he is a resident of the forum state, i.e., a person who has established himself in the state with the intention to remain so established indefinitely. He, or more frequently she, who so swears with the return ticket to the home state in the wallet or handbag, commits perjury." A finding by the court of one State in divorce proceedings that the petitioner is domiciled in that State is not necessarily conclusive upon the courts of other States in collateral proceedings,[65] however, and from all this it follows that, in the hypothetical case we are considering, it is doubtful whether W's *ex parte* decree is entitled to full faith and credit, or recognition, in the courts of the State in which her husband was domiciled. Presumably, were it found to be the case that New York would not recognize the Nevada decree, and it should be said that in a New Zealand court the most acute and complex evidentiary problems would arise in establishing this to be so, the court might well be obliged to recognize the decree *qua* the wife, but not *qua* the husband. The problems involved in recognizing divorces based on the wife's separate domicil, unless under

[62] Williams v. North Carolina II, 325 U.S. 226 (1945); Rice v. Rice, 336 U.S. 674 (1949).

[63] Sherrer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948); Johnson v. Muelberger, 340 U.S. 581 (1951).

[64] Professor Max Rheinstein, 22 University of Chicago L. Rev. (1955) 775, 776.

[65] Williams v. North Carolina II, 325 U.S. 226 (1945).

principles similar to those stated in *Travers* v. *Holley*,[66] as well as those based on the husband's domicil, are not merely doubled: they are increased in geometrical progression.

It is submitted that there are none of these difficulties to be encountered in the common law rules. No one can object to a wife, whose husband is domiciled elsewhere, petitioning a New Zealand court for a divorce on the basis that she has resided in New Zealand for three years and intends to reside in New Zealand permanently: while she remains, in the New Zealand view, domiciled in New Zealand, there is no harm done, and if she obtains her divorce purely on a migratory basis the fact that her divorce may not be recognized in another state need not overmuch concern the New Zealand legislature. On the other hand, in cases where a wife is, by the law of her husband's domicil, capable of acquiring a separate domicil, as is the case in some of the states of the United States, a divorce obtained by her on the basis of such separate domicil should, it is submitted, be recognized by the New Zealand courts, if it is recognized as valid by the courts of the husband's domicil. This view is, indeed, in accord with the principle in *Armitage* v. *The Attorney-General*,[67] and it is suggested that no sufficient reason exists, either on the ground of uniformity, reciprocity, or convenience, for extending the rule, already available at common law.

In short, it is apparent that the provisions of sections 7 and 8 of the Draft Code[68] and s.12A of the Divorce and Matrimonial Causes Act 1928 go too far, and there is no reasonable basis for believing that any obvious injustices or cases of hardship are likely to arise under the common law rules. It should, however, be mentioned that a valuable recommendation by the Commission is that recognition be granted to divorces or decrees of nullity granted by the courts of countries designated by Order in Council, and this is a recommendation which, if adopted, would save a great deal of difficulty.

It must be apparent from what has been said in this paper, that although a number of valuable recommendations are contained in the Royal Commission's Draft Code of Jurisdiction and Recognition, the Code as a whole is not, we submit, suitable for adoption in New Zealand. There are two reasons why this should be so. The first is that the New Zealand statutory law of divorce and matrimonial causes has developed over the years to meet practical difficulties as they have arisen. The New

[66] [1953] P. 246.

[67] [1906] P. 135.

[68] Section 8 of the Draft Code (providing for recognition of foreign annulments of marriage) is in terms substantially similar to those of section 7.

Zealand legislation in this field has always been progressive (although, as we have suggested in relation to sections 10B and 12A of the 1928 Act, it has progressed too far and in the wrong direction), and has already covered most of the points raised by the Royal Commission, although sometimes in a different manner and with a different result. The Draft Code, on the other hand, is more a manifestation of progressive academicism than a Code of practical measures to overcome practical problems. Indeed, many of the measures suggested appear to add practical difficulties to the present position without any real gain in clarity, uniformity, or practical benefit. The second reason is that while there is a good deal of emphasis both in the Report and in the Draft Code on uniformity and reciprocity with other countries, there is no indication of how the measures advocated are going to be received by other countries, or that the new bases of jurisdiction suggested are likely to be recognized by other courts in other countries. Without some positive assurance that this is so, it is perhaps not an overstatement to say that the suggestion that the divorce courts be thrown open to meet the new types of situation envisaged by the Commission shows an academic zeal for reform which has no relation to practical needs.

WILLIAM G. RICE

A Glimpse of Swiss Intercantonal Litigation[1]

While the Swiss Constitution of 1848 empowered the newly established Federal Tribunal[2] to decide controversies between cantons "provided they do not involve public law,"[3] thus limiting its competence to civil law controversies, the revision of 1874 gave it power in both the civil and the public law areas.[4] During the next twenty years, civil law litigation between cantons dwindled, and public law litigation waxed, till in the present century every reported decision is in the field of public law.[5] Therefore, though presumably they are not extinct, civil law controversies between cantons need not detain us.[6]

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[1] This article is in large part a chapter from a projected book on judicial settlement of intercantonal controversies. The author wishes to acknowledge indebtedness to the American Philosophical Society (Penrose Fund) and to the University of Wisconsin for support of this study of federalism.

[2] For a brief statement of the present constitutional and statutory foundations of the Federal Tribunal's authority to adjudicate between cantons, see this author's, "The Hongrin River Diversion," 2 Am. J. of Comp. Law (1953) 318, 319–322. The leading study of the period prior to the adoption of the Constitution of 1848 is Ernst Brand's Eidgenössische Gerichtsbarkeit (in Abhandlungen zum schweizerischen Recht) Part I (Before 1798) (1952), Part II (From 1798 to 1848) (1956). The most important work concerning the period since 1848 is Margrit Gut's doctoral thesis (U. of Zürich 1942) entitled Staatsrechtliche Streitigkeiten zwischen den Kantonen und ihre Beilegung.

[3] Const. (1848) art. 101. William E. Rappard, La Constitution fédérale de la Suisse, (1948) 162–4. Public law controversies between cantons were entrusted to federal political organs.

[4] Const. (1874) art. 110 and 113. The current series of reports (herein TF) of the Tribunal's decisions begins in 1875. The volume number added to 1874 is the date of any decision.

[5] This is chiefly due to a change of conceptual boundary. Compare Thurgau v. Zürich, 2 TF 275, with St. Gallen v. Thurgau, 13 TF 399 (intercantonal treaty concerning the maintenance of a church); Luzern v. Uri, 10 TF 147, with Schwyz v. Zürich, 75 TF I 451 (same concerning highway construction); Vaud v. Bern, 4 TF 360, 368, with Zürich v. Genève, 51 TF I 309 (support of indigents). The earlier case of each pair was deemed a civil law controversy; the later, a public law controversy. The Judicature Act of 16 Dec. 1943, art. 83, letter c, despite Const. art. 110, transferred "controversies of citizenship law between towns of different cantons" from the civil law side to the public law side of the Tribunal.

[6] Answering my inquiry, Eugen Blocher, formerly President of the Federal Tribunal, wrote me, 16 Jan., 1952: "Formerly in Swiss decisional law the concept of civil law controversy was greatly expanded for practical reasons so as to embrace situations which today are rightly considered as of public law nature." Probably one of these practical reasons was the Tribunal's desire to satisfy a growing public opinion in favor of settlement by a judicial rather than a political organ of intercantonal controversies, which, if in the realm of public law, it was incompetent to adjudicate prior to 1875."

Swiss writers have made various classifications of public law cases between cantons. Schindler (1921) names four main categories:[7] (1) territorial relations (actual and threatened intrusions on possession or on enjoyment of land-connected rights, including rights in water and air); (2) public assistance to and expulsion of indigent noncantonals; (3) legal assistance between cantons in administering criminal law (rendition of accused persons, investigation of crimes); (4) conflicts of competence (taxation, guardianship, and administration of estates). Five main groupings are made by Gut (1942):[8] (1) conflicts of competence; (2) territorial matters; (3) poor relief; (4) concordat (intercantonal treaty) relations; (5) legal assistance. Also by Giacometti (1949):[9] (1) conflicts of competence: (a) litigation, (b) wardship, (c) taxation; (2) "other similar controversies" about territory, especially (a) boundaries, (b) flow of streams, (c) intrusion; (3) poor relief; (4) concordats; (5) legal assistance. Birchmeier (1950) propounds another fourfold classification:[10] (1) territorial jurisdiction; (2) conflicts of competence: (a) taxation, (b) judicial jurisdiction, (c) poor relief; (3) concordats; (4) legal assistance.

Without reconciling these somewhat variant classifications, we may note that they all are very different from any classification that one would make of litigation between states of the United States of America, of which territorial relations (boundaries and water rights principally) are manifestly the chief subject. Relief to indigents, judicial assistance, and conflicts of competence would not be mentioned. These issues in the United States do not, perhaps under prevailing law can not, arise in the form of controversies between states, whereas in Switzerland they frequently arise in this form and each of them has produced far more decisions of the Federal Tribunal than have territorial issues. Our focus will be on conflicts of competence.[11]

[7] Dietrich Schindler, "The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes," 15 Am. J.I.L. (1921) 149, 165–188.

[8] Gut, note 2, at 90–112.

[9] Zaccaria Giacometti, Schweizerisches Bundesstaatsrecht, sec. 86 II (1949) (revision of first part of Fleiner's book of the same title and often designated Fleiner-Giacometti).

[10] W. Birchmeier, Handbuch des Bundesgesetzes über die Organisation der Bundesrechtspflege (1950) 299–300.

[11] While the Anglo-American law has developed rules for solving conflict of laws, it has not viewed questions of mutually exclusive jurisdiction of agencies or states as questions of conflict of competences. Within a state the problem is one of statutory interpretation; between states members of a federacy, it may be stated as one of interpretation of the federal constitution or statutes. Foreign courts here have more fondness for "general principles." *Cf.* the treatment of "public policy" issues by French and English courts. Dennis Lloyd, Public Policy, (1953) 75.

Conflict of competences within a state is not unusual. But whereas in Anglo-American

Though all the mentioned Swiss jurists separate territorial issues from competence issues, Giacometti at least recognizes the similarity between them. For jurisdiction (competence) is in large part based on territory, that is, on exclusive or primary governmental control over a specific physical bulk of the earth and its atmosphere.

Acceptance of the territoriality of law and of authority of organs of government as normal resolves many conflicts of competence between states into the single problem of settling the territorial boundary between them. These geographical conflicts of competence are frequent subjects of adjudication. International courts and the highest courts of federal countries repeatedly have decided such cases. From one point of view they are analogs of contests over private ownership. As each owner has in many respects an exclusive right to rule others when they enter his premises (or to exclude them), so every state has in many respects an exclusive right to rule the people within its territory, whoever they may be. To settle these conflicts of competence, what is necessary is to demark precisely the land of one man from that of another, or the territory of one state from that of another.

In Switzerland and many other countries, courts have concluded that they are no less fit to draw ideal boundaries than territorial boundaries. The Swiss Constitution expressly empowers the Tribunal to settle "conflicts of competence between federal authorities, on the one hand, and cantonal authorities, on the other,"[12] as well as public law controversies between cantons, which are deemed to embrace conflicts of this sort.[13]

Swiss public law assumes generally that for many controversies one authority alone is competent or has priority over all others and that this

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legal systems, it is usually decided without the conflicting agencies appearing as antagonists in litigation, e.g. Levinson v. Spector Motor Service, 330 U.S. 649 (1947) (Interstate Commerce Commission and Wage and Hour Administration not parties but allowed to participate as amici curiae on reargument), the opposite is normal in Swiss and other European systems.

[12] Const. art. 113 par. 1 (1).

[13] Since in deciding where a decedent was located when he died, in order to determine where his estate should be administered, "there is nothing but a positive competence conflict," it should be settled by public law action between cantons, said the Tribunal in Wardship Authority of Zürich v. Probate Authority of Luzern, 56 TF II 301, 302, 1931 JdT 15, 16. And it was so settled: Zürich v. Luzern, 56 TF I 450, 1931 JdT I 541. But see Zürich v. St. Gallen, 81 TF I 43.

The present Judicature Act art. 83(d) and (e) expressly names certain intercantonal conflicts of competence as subject to judicial settlement by the TF. The 1911 act (art. 177), now superseded, amplified the description of "public law controversies between cantons" entrusted to settlement by the Federal Tribunal, by adding: "Included particularly are: correction of intercantonal boundaries; conflicts of competence between authorities of different cantons; controversies that arise about the application of intercantonal compacts, so long as something more is at issue than the mere infringement of rights and interests of private persons."

primacy of competence may be established by litigation waged between the possibly competent authorities themselves.[14]

In the United States, though the Supreme Court, in a case between states, determined the domicil of a decedent when each of the several states demanded inheritance taxes that together totaled more than the estate,[15] it has refused to adjudge which state has power to levy an inheritance tax when this factor of insufficiency of the estate was absent.[16] The Swiss court, however, uses judicial scales to weigh the claims of different cantons in taxation and administration matters, wherever by legislative rule or standards of justice that court regards the claims as mutually exclusive.

The Swiss notion of conflict of competences is not limited to the situation in which political units both (or all) are ready to do, or refuse to do, the same thing. A conflict between a canton and the central state

> does not presuppose that the same power (*attribution*)[17] should be claimed by a federal authority and a cantonal authority; it is enough that a canton denies to a federal authority a power that the latter claims to have. *Fribourg v. Federal Council*, 78 TF I 14, 24.

And this applies equally to a conflict between cantons. As the Tribunal said of one form of conflict of competences, double taxation, in violation

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[14] In the United States, even where it is clear that agencies of two sovereignties can not both have authority and that the drawing of the line between them is a legal question (a matter of statutory construction usually), the agencies rarely appear as litigants against each other. The line is drawn by agreement between them; or by executive decision (i.e. by agreement between the different executives to which they are subject); or by judicial decision in which usually one (or more) of the litigants is a private person. Such a person may challenge the act of an agency as outside its jurisdiction or competence, whether or not within the jurisdiction or competence of another. If this other agency participates in the litigation it is ordinarily only as an amicus curiae; it probably would not be allowed to intervene as a party; it would not be thought to have a legal interest. Contrast the course of the contest concerning the federal-state line in labor relations control, recounted by Keith Lorenz in "Conflict of Jurisdiction between National and New York State Labor Relations Boards," 5 Ind. and Labor Relations Rev. (1952) 411, with the contemporaneous Swiss settlement of the same sort of line in waterpower control in Fribourg v. Federal Council, 78 TF I 14, recounted in my article, note 2.

[15] Texas v. Florida, 306 US 398 (1939).

[16] Massachusetts v. Missouri, 308 US 1 (1939). It also said that the claims were not mutually exclusive in this case while they were in Texas v. Florida, but this statement appears to belie the language of the reciprocal legislation of Massachusetts and Missouri.

[17] French, German, and Italian words within parentheses are the very words of the decision. Words within square brackets are inserted by the author to clarify a quotation.

In Genève v. Confédération, 81 TF I, 35 39, the court similarly says that the sort of controversy so described is "a disagreement between the Confédération and one or more cantons concerning the extent of their powers. It looks to the demarcation of the two sovereignties."

of the Constitution, article 46, occurs

> whenever one canton by laying a tax intrudes into the tax jurisdiction reserved to another, even if the latter makes no use of it, does not impose such a tax itself. So it is of no importance whether the plaintiffs are [presently] burdened by the established church of Thurgau with a tax like the central tax of St. Gallen [forbidden by Const. art. 46]. *Odermatt v. Catholic Tax Authority of St. Gallen*, 69 TF I 225, 233.

Even the excessive amount of a fee may make it a "tax," which, as a tax, is forbidden by article 46 to be assessed against the citizen (or rather, I think, the domiciliary) of another canton.[18] Such intercantonal tax contests are classified by all the authors cited as competence conflicts.[19]

But in other areas there is uncertainty. For Birchmeier the class includes, besides tax cases, cases concerning relief and repatriation of the needy and those concerning judicial jurisdiction (wardship and administration of decedents' estates). For Giacometti (who describes territorial controversies as "similar") public assistance and intercantonal deportation controversies are not within the concept of conflict of competences.

Conflicts concerning taxation, in view of the constitutional prohibition of plural taxation, are particularly numerous, but many, indeed most, of them are litigated between a taxpayer and a canton, rather than between contesting cantons.[20] Here, however, we confine ourselves generally to cases contested between cantons and to the issues presented by them.

A good example of conflict between cantons concerning taxation of movable property is *Luzern v. Aargau*. A brick company with domicil

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[18] Ticino v. Graubünden, 49 TF I 131.

[19] Where the issue is that of appropriate distribution between cantons of revenue gathered by them in administering the collection of a federal tax, e.g. Nidwalden v. Luzern, 45 TF I 37, and Neuchâtel v. Genève, 75 TF I 200, the controversy is deemed a conflict of claims rather than of competences.

[20] Attempt of a canton to burden an individual or refusal by a canton to grant some claim he makes frequently involves the question of which of two or more cantons has the right or duty. Though in form these cases in which one party is not a canton, are not intercantonal controversies, they often resolve intercantonal conflicts. Thus the public servitude upheld in the intercantonal case of Thurgau v. St. Gallen, 54 TF I 188, was further defined by the suit of Mr. Odermatt, "supported by the executive council of Thurgau," against a tax agency of St. Gallen, 69 TF I 225. For a recent example of settlement of tax power between cantons by private litigation, see Bruderholz Co. v. Baselstadt, 79 TF I 142, overruling Rosenthal v. Zürich, 49 TF I 46, and denying to the canton of domicil of the owner of extracantonal land the right to tax the increment in its value that is due to the owner's effort. See also note 25. Similarly in the United States interplay between private litigation and litigation between states is frequent in clarifying what may be called domestic international law. E.g., Hinderlider v. La Plata River Co. 304 US 92 (1936).

in the plantiff canton owned a motor truck that was licensed there but was used at a branch plant in the defendant canton, which demanded its licensing (*Verkehrstelligung*) there. A compact or concordat between the cantons concerning circulation of motor vehicles had to be interpreted. The question is: which of several cantons are authorized to exercise certain sovereign authority over a particular object? There is therefore a public law controversy between cantons.[21]

Another type of tax was before the court in *Zürich v. Luzern*. Here the question was: What canton is entitled to administer and tax the estate of B who died in a Zürich hospital? In effect the court held that, though the question was one of public law, its answer was to be found in the civil law of domicil.[22]

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[21] Luzern v. Aargau, 47 TF I 509.

> [Aargau's] interpretation is supported not only by the character of the tax as one which . . . takes no account of the wealth or income of the owner—which tends to answer the question of fiscal sovereignty rather according to the territorial connection of the thing taxed than according to that of the taxpayer, but also by the nature of the license itself as a governmental permit for use of highways. . . . To this effect is the Guillermin case [*Guillermin v. Vaud*, 44 TF I 11], in which [in the absence of concordat] the court recognized the sovereignty for taxation to belong to the canton of situs (*des ordentlichen Standesortes*) except for an appropriate division of the tax in case the situs changed during the tax year for a fairly long period, at least a continuous quarter year. In that case the domicil of the owner was considered as creating only a presumption that the vehicle was kept there. Considerations controlling then, lead to the same conclusion in principle under the concordat. *Ibid.* at 514–516.

[22] Zürich v. Luzern, 56 TF I 450.

> Of course she was staying (*hielt sich auf*) in Zürich when she died; but not every place where a person happens to be at a particular time is intended by the term *Aufenthaltsort* used in Civil Code art. 24 par. 2. The French and Italian texts of this paragraph which speak of the "*lieu où elle réside*" and "*luogo dove dimora*" show that the provision has in mind a stay of some duration which creates rather close ties with the place. Being at a place temporarily or fortuitously does not constitute residence (*résidence*) but at most abode (*séjour*). [Citations of cases.] This then raises the question whether Zürich can be deemed her *Aufenthaltsort* in the sense of this paragraph. And the basis and purpose of the provision lead to a negative answer. . . .
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> . . . Civil domicil is frequently determinative of intercantonal or international conflicts of private law and of jurisdiction of courts or executive officers. It is therefore necessary to give it as much fixity as possible. This reason applies equally for the determination of *Aufenthalsort* in so far as it replaces domicil in the application of private law or the demarcation of jurisdiction under federal law. Hence if a person moves from one *Aufenthaltsort* to another without entirely breaking the ties that bind him to the first, the place to which he is attached by the stronger ties is to be deemed his *Aufenthaltsort* in the sense of Civil Code art. 24, par. 2. . . . [It is important to have fixity of tax domicil; likewise] the *Aufenthaltsort* that determines, as between canton and canton and as between international states, the private law applicable and the jurisdiction of courts, must have the greatest possible fixity. That it is easier to determine the *Aufenthaltsort* of a person if it depends merely on where he momentarily is, can not count, quite apart from the fact that such a mechanical interpretation would not agree with the French and Italian texts and would often produce unnatural results. . . . The *Aufenthaltsort* of B in the sense of the Code was, at the time of her death, Luzern. She showed clearly by keeping, while she was in hospital in Zürich, a storeroom in Luzern and the key of a wardrobe in the room in which she had lived there, in which her belongings remained, that, as on previous trips, she intended to return to Luzern. [Further supporting Luzern as her stronger tie were her presence there for five months in 1920 almost nine years before her death and her repeated statements to the postmaster of her hotel there.] Hence administration must take place in Luzern. Accordingly the succession tax on her personal property is leviable by Luzern not Zürich. *Ibid.* at 454–456.

A revenue motive brought Luzern and Zürich into contest. But the case may be described either as a conflict of competence to administer estates (an executive competence of the canton to which the collection of the tax was incidental), or as a controversy concerning interpretation and application of the word *Aufenthaltsort* as used in the federal Civil Code, which declares:

> Art. 23. A person's domicil (*Wohnsitz*) is where he resides with the purpose of remaining permanently.
>
> No one may have several domicils at the same time.
>
> The last provision does not apply to industrial and commercial enterprises.
>
> Art. 24. A person keeps his domicil until he establishes a new one.
>
> The place where he abides (*Aufenthaltsort*) is deemed his domicil when the existence of an earlier domicil can not be proved or when he has left his domicil abroad and has not acquired one in Switzerland.

While the court might have reached the same conclusion—that B was located at Luzern—by accepting the argument of Luzern that B was domiciled there because she had obtained a permit to reside there ten years before (not renewed for the last nine years of her life) and had thereafter established no other domicil, having traveled and lived entirely at hotels, the court actually relied rather more on the practical argument that she was a person without intention to settle anywhere, a mere wanderer, and her *Aufenthaltsort* was therefore to be deemed her domicil. With Luzern rather than Zürich she had the stronger tie; it was her anchorage, her center of living.

The Tribunal has defined other words besides *Aufenthalt* in very similar language. The "center" criterion is so favored by it in tax cases that several different words tend to coalesce. Thus, a few years later, the court said in *Neuchâtel v. Genève* that to determine whether Descoeudres, an unmarried doctor of Neuchâtel citizenship, whose parents' domicil was Genève, and who was engaged in medical missions abroad, had Swiss *domicil*, it was necessary to determine whether he had established any domicil other than that of his parents in Genève. (If he had Swiss domicil, his tax for exemption from military service belonged to his canton of domicil; if he had not, to his canton of origin, the canton of which he was a citizen or cantonal.)[23]

Clearly Descoeudres has an actual bond (*lien de fait*) with Genève, where his parents are domiciled and where he returns after each of his foreign missions. Moreover he has never resided anywhere abroad with the intention of

[23] Neuchâtel v. Genève, 75 TF I 200.

making it the center of his life (*le centre de son existence*). . . . When one considers the facts that his military papers are deposited in Genève, that he pays civil taxes there, that he votes there, it is clear that the requirements of the existence of a domicil there are in concord. 75 T F I. 200.

The following year in *Aargau v. Thurgau*,[24] the court used similar language to define *Wohnort* (*not Wohnsitz*, domicil), as used in Penal Code, art. 348, par. 1, describing the place of prosecution of a person for certain crimes. This was held to mean not domicil in the Civil Code sense, but "the place of the central point of his life (*Ort des Mittelpunktes seines Lebens*), ordinarily where he has obtained a dwelling for himself and his family in which he resides or where he usually sleeps."

And more recently in *Straub v. St. Gallen*,[25] a case involving the same issue as *Zürich v. Luzern*, but brought by the decedent's widow against two cantons, the court distinguished between civil domicil and tax domicil (i.e. domicil at death determining jurisdiction to administer the estate) as follows:

The domicil (*Wohnsitz*) of a person is the place whereat he stops with the purpose of a permanent stay, according to Civil Code art. 23, par. 1. But in tax law the operative actual domicil is controlling. The merely formal one in the sense of Civil Code art. 24, par. 1, which by civil law continues after giving up an actual one until a new domicil is acquired, is held not enough in tax law to establish the place of taxation between cantons. [Citation of reported and unreported cases.] The domicil (*Domizil*) of Civil Code art. 24, par. 1 is just a provision of convenience so that, in changing domicil (*Wohnsitz*), in the interim before a new one is acquired, some place is available to which the civil law relationships conditioned on domicil can be tied. But no great importance should be given to provisions of Civil Code art. 23 when there is competition [i.e., a judicial choice must be made] between [Civil Code] domicil and a place of rather long continued stay (*Aufenthalt, résidence de fait*). . . . 77 TF I at 25.

[24] Staatsanwaltschaft Aargau v. Staatsanwaltschaft Thurgau and Verhöramt Appenzell A. Rh, 76 TF IV 265, 269. Though the cantonal prosecuting offices are the named parties, the suit is a kind of suit between cantons. Cases between cantons are entitled either in the name of an organ or department or in the name of the canton often without discoverable reason. See text at note 42. *Cf.* South Carolina State Ports Authority v. Seaboard Air Line RR, 124 F Supp 533, 536 (1954).

[25] Straub v. St. Gallen and Thurgau, 77 TF I 22. This interpleader type of action brought by a taxpayer is becoming frequent. Thus in 1954 alone there are reported: X Co. v. Luzern and Zürich, 80 TF I 19 (affiliated corporations); Agopian v. Zürich and Genève, 80 TF I 194 (rug merchant held taxable on rugs, in bond, but accessible to his customers there, by canton of their presence rather than by canton of his domicil); Bryner v. Zürich and Genève, 80 TF I 330 (payment by individual of tax assessed by wrong canton before right canton made retroactive assessment, bars latter canton's right for past years).

The Straubs, six or seven months before Mr. Straub's death, had sold their business and home in Arbon, Thurgau, and had moved to St. Gallen, to live temporarily with Mrs. Straub's sister. They put their furniture in storage in St. Gallen, because they could not find space in Arbon, until they could get another dwelling in Arbon.

> They had no lodging, no dwelling, not even any furniture in [Arbon]. Though they remained applicants for a dwelling at the housing office [there] and did not withdraw their identity papers, that is nothing that spells domicil. They left Arbon for an indefinite time. . . . How long they would stay [in St. Gallen] depended on entirely uncertain circumstances. [Straub's vacillating intention to return to Arbon] has no significance. Nor that. . . he paid income and property taxes there and not in St. Gallen. . . . After a stay in St. Gallen long enough to establish relations, more than half a year, while no actual connections with Arbon continued, for tax purposes actual abode (*Aufenthaltsort*) must count as domicil. 77 TF I at 26.

Mrs. Straub's permanent return to Arbon after her husband's death was deemed irrelevant.

Tax domicil is therefore not the same as civil law domicil. Only the maintenance of actual, as contrasted to sentimental, attachment to another place suffices to escape taxation at the place of usual presence. In general it is de facto residence, not formal residence, which counts.[26] This is most vividly shown by the recent case of *Thurgau v. St. Gallen*,[27] in which the court overruled earlier cases (after consulting all cantons and learning that two thirds favored the change) and held that even a minor who is employed and lives away from home is ordinarily tax-domiciled where he works and lives, though his civil domicil remains with his parents.

The power to exact taxes may be the nub of the contest also in cases concerning territory. So it was in an earlier case between *Thurgau* and *St. Gallen*[28] over the existence and scope of a political servitude which accorded to the Catholic parish and to the school district of Rickenbach, Thurgau, parts of the adjacent St. Gallen town of Kirchberg.

Taxation was of course the gist also of the subsequent case,[29] quoted earlier for its definition of double taxation, where Odermatt and other residents of the farmsteads of Ernstall and Buomberg in the same town of Kirchberg in St. Gallen sought relief from paying the cantonal church

[26] Christopher Hughes, The Federal Constitution of Switzerland, (1954) 59.

[27] Thurgau v. St. Gallen, 80 TF I 184.

[28] Thurgau v. St. Gallen, 54 TF I 188, partly reported in 1927–28 Ann. Dig. of Int. Law Cases, Case No. 289.

[29] Odermatt v. Catholic Tax Authority of St. Gallen, 69 TF I 225.

tax of St. Gallen, since they paid church taxes to the Thurgau parish of Fischingen, part of which went to pay the cantonal church tax of Thurgau, which, unlike that of St. Gallen, was not levied on individuals but on parishes. The Administrative Council of the Catholic established church of St. Gallen asserted that this St. Gallen central tax was due from "all Catholics inhabiting St. Gallen, even those who belong to no St. Gallen parish, whether because they live in an entirely Evangelical town or because they belong to an out-of-canton parish"[30] and argued that this was "no double taxation because the central tax of the two cantons is not of the same kind and does not relate to the same tax subject."[31] In their suit against the church tax administration of St. Gallen, the plaintiffs had the support of the Executive Council of Thurgau, which virtually transformed the case into one between cantons.

The parties agreed that tax liability depended on domicil. The plaintiffs, said the court, were subject to St. Gallen taxes for the canton and town. "But it is otherwise in the matter of taxes for the church, cantonal and local, because Ernstall and Buomberg belong to the Thurgau parish of Fischingen".[32]

Another tax matter that was brought to the Tribunal as an intercantonal controversy concerning competence related to waterpower. Solothurn granted a concession, pursuant to which the grantee diverted water from the Aar in Solothurn by a millrace, which carried it into Aargau where the factory of the Albert Fleiner Co. used the power. The company contested Solothurn's taxation of this power. The court recognized that Aargau, as well as the Fleiner Co., had standing to sue.[33] Its opinion begins with the bald statement "Both the canton and the

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[30] 69 TF I at 229.

[31] 69 TF I at 230.

[32] 69 TF I at 232. Referring to the earlier case between the cantons, the court continued that because of the:

> international law, or public servitude, by force of which St. Gallen is bound to forgo the exertion of its sovereignty (*Hoheit*) respecting affairs under church administration in part of its territory and on the other hand to allow another canton, Thurgau, to exercise there the functions deriving from ecclesiastical power (*Hoheit*), the exercise of the functions of church authority (*kirchenhoheitliche Befugnisse*), in particular the ecclesiastical tax power (*Hoheit*), over Ernstall and Buomberg belongs to Thurgau and not to St. Gallen. . . . Their inhabitants . . . the plaintiffs, to be sure, have their domicil in the political territory of St. Gallen, though not in its church territory, but in the territory of the Catholic established church of Thurgau and the Catholic parish of Fischingen. . . . As to parish taxes this has never been controverted. For the cantonal church taxes the rule is the same. So it violates the prohibition of double taxation that the Catholic established church of St. Gallen has levied the central tax on the plaintiffs. *Ibid.* at 232–233.

[33] Aargau v. Solothurn, 18 TF 689.

company may bring suit (*Beschwerde*).[34] Between the cantons a conflict of sovereignty is alleged." 18 TF at 700.

The private right, said to derive from the governmental right, is recognized (again without elaboration): "For the same reasons as in double taxation cases the right to sue is always accorded to the taxpayer concerned." *Ibid.*

The Tribunal then discusses the merits of the case and concludes:

> So the position of Solothurn that that part of the power delivered by the fall of the water within the territory of Solothurn may be subjected to a franchise tax (*Konzessionsgebühr*), does not infringe the sovereign rights of Aargau, but appears on the contrary to be well-founded (*prinzipiell als begründet*). . . . There is no unconstitutional double taxation. Solothurn is not taxing any tax-object within Aargau, such as the Fleiner mill, but it exacts only a franchise tax on the waterpower that it has granted. 18 TF at 702.

The court would not pass on the question whether the franchise gave exemption from such a tax or whether the assessment was in proper amount, since these were questions of intracantonal law, not appropriate to this litigation.

The most elaborate opinion on intercantonal competence to tax is found in a case between the two halfcantons of Basel litigated during the economic depression of the 1930's.[35] Baselstadt, to finance a public employment program, enacted in 1936 a tax statute which exacted "work pennies" (*Arbeitsrappen, centimes pour le travail*) from all employed persons, which, to quote the statute, was "an offering by people who have jobs for the benefit of those who have not." It was a 1% excise deducted and turned over to the canton of Baselstadt by the employer from all wage and salary payments earned from employment in the canton "by persons subject to the tax jurisdiction of the canton." On the income earned in Baselstadt by persons not subject to its tax jurisdiction, i.e., those domiciled in Baselland or elsewhere outside the taxing canton, "a corresponding equalization excise is to be contributed by their employers"; and "for the payment of [this] excise the same provisions [relating to payment and record-keeping in respect of the excise on employees] apply." Income of self-employed persons domiciled in the canton was similarly taxed. There was an exemption of persons of extremely low income in the form of a refund by the canton *to* domiciled earners of less than 1000 francs a year; and *with respect to* nondomiciled earners of less

[34] The appropriate type of action, at least for the canton, would seem to be the *Klage*. See text at note 41.

[35] Baselland v. Baselstadt, 63 TF I 147.

than 1000 francs; and *to* self-employed persons earning less than 1000 francs (with larger exemptions, in each instance, for those having dependents).

Suits were brought against Baselstadt both by workers who lived outside that canton and by the canton of Baselland. The court held that the exaction of work pennies was neither a fee (*Gebühr, émolument*) nor an assessment for benefits (*Beitrag* or *Vorzugslast, taxe*), but a tax (*Steuer, impôt*) in the sense of the constitutional prohibition of multiple taxes. "It is an exaction from the wage as it comes to the worker by reason of the collective labor contract, an excise levied in fixed proportion to this wage," and, not being "connected with a specific expenditure by the state for the benefit of the persons required to pay it," it is nothing but a tax.

The court held that the tax on the employer with respect to his workers not domiciled in Baselstadt was an exaction which would be passed on to them. It was therefore "double taxation" in the Swiss sense of taxation by one canton when only another was competent to exact such a tax from them.[36]

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[36] As stated by the court:

> If this statute had declared that all persons regardless of domicil who were employed in Baselstadt were subject to this excise, there would clearly be, in the instance of those domiciled outside the canton, an invasion of the tax sovereignty of the canton of domicil and thus, with respect to those workers, double taxation forbidden by the Constitution. . . . Authority to levy taxes, even for the support of the needy, from movable property and income of a person is restricted solely to the canton of the taxpayer's domicil, though the canton of citizenship, not that of domicil, carries the burden of poor relief (at least in cases of permanent need). [On the other hand, the burden of relieving unemployment falls] according to present legislation, not on the canton of a person's last employment but on the canton of his domicil.
>
> [If the statute imposed the ultimate burden of this tax on the wage-earners domiciled in other cantons, though the employer originally had to pay it, the situation would be the same.] So the considerations above stated would apply equally here. [The court has held in a series of decisions that cantonal laws which taxed the owner of hypothecated land in the canton on its full value and authorized him to deduct from his payments to his creditor the proportion of the tax that he had paid corresponding to the creditor's interest in the land, would effect] disguised taxation of the creditor's right at the place of the hypothecated property and found it to be an invasion of the tax sovereignty of the canton of domicil of the creditor—of its exclusive right to tax all the creditor's assets, including those secured by land. [Citations.] The supposed case of authorizing the employer of a non-domiciled worker to pay the tax and deduct its amount from the worker's wage would be adjudged in the same way.
>
> Nor is the legal scene different, so far as tax sovereignty between cantons is concerned, when the statute under attack fails to empower the employer to make such a deduction, i.e., fails to subject the worker to a corresponding legal obligation, as a public law duty, to allow it. The object of the excise, the precise thing that will be burdened by it, is still the income of the worker derived from the wage payment of the employer . . . [This may be gathered from the language concerning purpose, exemptions, refunds, etc.]
>
> The conclusion is unavoidable that the employer, even though the statute does not expressly empower him to do so, will not carry the burden himself but will pass it on to the worker by a deduction from his pay. . . . [Of many provisions indicating that this was the intention of the statute one is the requirement that the employer] keep wage records showing for every employee the amount of his pay and the deduction of *Arbeitsrappen*, which applies also in respect to the equalization excise. . . .
>
> So Baselland's complaint against the equalization tax is sustained. Likewise, the actions

Finally the court ruled on the prayer for return of tax revenue collected. It held that no order was necessary because Baselstadt had undertaken to return it to the employers if the case went against it. And any requirement that employers repay their workers lay outside this suit. As for Baselland it had "not made such a demand. Nor has it standing to do so."

Intercantonal jurisdictional conflicts arise not only with respect to taxation. Unlike the conflicts we have hitherto examined, the conflicts between cantons concerning prosecution for crime that take the form of intercantonal suits are usually negative, that is, each canton prays for a declaration that it *is not*, and that another canton *is*, the proper authority to prosecute.[37] A positive conflict in penal adjudication, however, can be the subject of intercantonal litigation, as when a prosecuting canton seeks the executive assistance of another and, upon the latter's refusal, sues to compel the giving of such assistance. If the refusing canton denies the requesting canton's competence to prosecute because the matter is within the competence to prosecute of the refusing canton, there is positive conflict. Merely noting the existence of much litigation concerning conflict of both types relating to criminal law administration, we turn now to some custodial cases. Here too the conflict is ordinarily negative.

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for review brought by workmen domiciled in cantons other than Baselstadt. But there is no violation of art. 46 in the case of workers domiciled outside Switzerland; because art. 46 deals with double taxation between cantons and not with double taxation between nations—except as to taxes on land and its produce. 63 TF I at 156–164.

The court concluded the main part of its opinion with this statement about the standing of the workers to sue:

> . . . The cutting of the income of the employee working outside his canton of domicil by the imposition of a tax with respect to it on the employer can not, from the point of view of Const. art. 46 concerning double taxation and the drawing of bounds of tax sovereignty between cantons, be deemed at all different in substance or be otherwise dealt with than the taxation of the worker directly; therefore the workers have undeniably shown themselves entitled to sue, though the statute involved directly imposes a duty only on the employer. 63 TF I at 165.

The French terms for the exactions are quoted from the decision as reported in the Journal des Tribunaux, a periodical which reports in French leading decisions rendered in German. 1938 JdT I 499.

[37] Claude Rossel, Le déni de justice formel dans la jurisprudence du Tribunal fédéral, p. (doctoral thesis, U. of Lausanne, 1951) 21–22 (quoting Widow Meyer's case, 24 TF 178, 182) and p. 37–43. According to Rossel, the federal Penal Code, enacted 1937, almost abolished negative conflicts of penal competence between cantons; that is, he maintains that the application of this or any federal statute that apportions jurisdiction between the several cantons is not a competence conflict. But I venture to use the term to include these cases. Whatever the classification, problems are solved by litigation between cantonal prosecutors before the Federal Tribunal.

In *Zürich v. Genève* the Tribunal expounded and generalized the right of one canton, here the canton of domicil, to the co-operation of another canton in certain civil proceedings. Flora Walter of Aargau, domiciled in Zürich, had been there administratively declared incompetent (because she was a prostitute) and committed by the Wardship Authority (*Waisenamt*) of Zürich to a reformatory. By this time she was in Genève, whose Executive Council refused to comply with a demand of Zürich for her return, because the federal extradition law did not apply and the Genève law did not allow this administrative internment that her guardian desired, and Zürich law permitted, for such conduct. The Federal Tribunal recognized that, though wardship was governed by civil law, its administration (*organisation*) both in intracantonal and intercantonal aspects (*rapports*) "wears the dress of public law."[38]

In the foregoing case the suit was brought by the canton claiming jurisdiction over the woman as against the defendant canton which asserted its own legal competence to deal with her (or to leave her at large). The same sort of issue—but with the administration of a deceased's estate as the object of the dispute—was raised five years later in a case in which the Wardship Authority (charged with administration of estates)

[38] Zürich v. Genève, 51 TF I 309.

So, moreover, do all the questions relating to assistance between cantons, a duty imposed on them either directly or indirectly by the federal Constitution—art. 61 ["Final civil judgments rendered in one canton are enforcible throughout Switzerland."] and art. 67 ["Federal legislation shall provide for extradition of accused persons from one canton to another. . . ."]—and by the laws applying it. . . . Rights of the ward are not the only ones involved; there are also rights of wardship authorities as organs of administration and cantonal sovereignty. . . . Wardship has become an institution of federal law governed by the Civil Code which overrides cantonal law. The assistance here demanded is its corollary. . . . Undeniably statutes sometimes expressly prescribe the duty of assistance between cantons . . . as to administration of estates . . . as to criminal investigation. . . . But assistance is due also in other cases without express legislation. In civil cases, despite the language of art. 61 of the Constitution [which refers only to judgements], assistance has been extended to all steps preceding judgements. . . . In levies of execution (*poursuites*), though statute law is silent, officers of the several cantons are bound to help each other. . . . In [this] area, the court has said, Rothschild v. Gelpke, 29 TF I 441, 445, Switzerland is a single jurisdiction (*einheitliches Rechtsgebiet*). *Cf.* Kirchhofer, Rechtshilfe unter den Kantonen, ZfsR vol. 26, p. 557. Intercantonal assistance in matters of wardship is based on the same reasons. . . . Execution in another canton of an order obtained by a guardian from the wardship authority of the domicil is not expressly provided for, doubtless because the legislature . . . did not wish to bring into a statement of private law, rules relating to public law; probably also because it thought that the obligation of assistance needed no mention in intercantonal relations because it was recognized even in international relations. *Ibid.* at 315–318.

[Committal to an institution is based on] the federal civil law and can be enforced in Genève as well as in the other cantons without the aid of cantonal law or even despite it. The refusal of the cantonal authorities, relying on [cantonal law], is contrary to the federal Constitution, transitory provisions, art. 2 [which declares that provisions of federal laws, concordats, and cantonal constitutions and laws contrary to the present Constitution become void by virtue of its adoption or the promulgation of the laws it calls for], and is therefore unlawful. For it is because of federal law (Civil Code art. 406) and not of Zürich law that the Zürich Wardship Authority has ordered her committed. *Ibid.* at 320.

of the City of Zürich sought civil law review[39] of the refusal of the Probate Authority (the corresponding agency) of the City of Luzern and of the Executive Council of that canton to send the will of Rosa von dem Bussche to Zürich for probate. The court decided that the issue here, namely, where B was domiciled, was one which should not be tried in such a proceeding, but was fit for trial by public law review. The court said that, though public authorities might bring civil law review "when they have the position of civil parties, as, for instance, in controversies over the ending of parental authority or wardship", this was not a case of that sort. Here the two parties were rivals in the exercise of jurisdiction. The plaintiff contested the defendant's competence "in the matter dealt with in Civil Code art. 551 and claims this jurisdiction itself". Thus

> There is nothing but a positive conflict of competence. In this situation the controversy could not be settled by a civil law review. As it involves authorities of different cantons, public law review is much more appropriate—which in fact has been started in addition to the civil law review. 56 TF II at 302.

The public law case to which the court here refers has already been discussed as a tax case.[40] In it the cantonal Executive Council of Zürich appears as plaintiff. Fifteen years later in *Valais v. Zürich*,[41] the Tribunal held that this sort of controversy is properly tried in an original action (*Klage*) rather than either type of review action (*Beschwerde*). But the distinction between review and original action is not important, so long as the case is a public law proceeding; for the court considered the claim of Valais on its merits, though Valais had erroneously brought a review action.

Generally, original actions against another canton are started by the cantonal Executive Council. But federal statutes authorize the bringing of original actions that relate to competence between cantons by an organ of one canton charged with the particular responsibility against the corresponding organ of another. Such an intercantonal case was *Orphans' Office of Krummenau* (*St. Gallen*) v. *Orphans' Office of Wädenswil* (*Zürich*),[42] brought under art. 83(e) of the present Judicature Act, an

[39] Wardship Authority of Zürich City v. Probate Authority of Luzern City and Cantonal Council of Luzern, 56 TF II 301.

[40] Zürich v. Luzern, 56 TF I 450. See note 13 and text at note 23.

[41] Valais v. Zürich, 71 TF I 233, 236. So in Hauptlin and St. Gallen Town v. Baselland, 71 TF I 240, a review action, the Tribunal states that it would have allowed the case to proceed as an original action if it had been brought by the canton (Executive Council) instead of the town.

[42] Orphans' Office of Krummenau v. Orphans' Office of Wädenswil, 71 TF I 158.

action concerning change of domicil of a ward. In this case a feeble-minded German, who had lived with his mother in Wädenswil until her death, had been placed under wardship of his brother, who put him in a private nursing home in Krummenau. The latter town's Orphans' Office sued for a transfer of the wardship administration to itself. The plaintiff's standing to sue was recognized, but, on the merits, the court decided for the defendant Office of Wädenswil, applying Civil Code art. 377: "The ward can change his domicil only if the wardship authority consents."

A situation of striking "human interest" lies behind the questions of legal assistance that Obwalden[43] recently brought to the Federal Tribunal—an unnoticed precursor, in some aspects, of the much publicized and dramatic cases of the Finaly orphans in the French courts.[44]

Agnes Huber of Kerns, Obwalden, not married, bore there a son, Hans Rudolf, on July 15, 1945. Pursuant to Civil Code art. 311, the Wardship Authority of Kerns appointed August Bucher to be his temporary guardian (*Beistand*). (The child would later, according to the Code, be put by the Authority under the parental control of his mother, his father, of a permanent guardian, according to circumstances.) Against Bucher's will, the mother took the child to the Keller-Siegfried family in Winterthur, Zürich. The Kellers were Protestant, but Agnes Huber, who was Roman Catholic, wished them to care for her son, and opposed the order of the Authority of Kerns that, till Catholic foster-parents could be found, the child should be placed in a Catholic orphanage. Her appeal from this order to the Executive Council of Obwalden was unsuccessful. Since the Kellers (apparently with the mother's approval) nevertheless refused to give the child over, the Wardship Department of Obwalden on 5 Nov. 1946 asked the Zürich authorities for legal assistance, which was refused.[45]

Having recorded the unsuccessful mediation, in neutral territory, of

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[43] Obwalden v. Zürich, 75 TF I 139.

[44] 1952 Jurisclasseur périodique II 7302 (Cour d'Appel de Grenoble, 1952). Compare also the recent litigation concerning James Michael in Sklaroff v. Stevens, 120 A 2d 694, and Skeadas v. Sklaroff, 122 A2d 444 (R.I. 1956), cert. den. 351 US 988 (1956); and concerning Hildy in Ellis v. McCoy, 332 Mass. 254, 124 NE 2d 266 (1955). To escape the consequences of the latter decision and to effectuate adoption of Hildy, Mr. and Mrs. Ellis took Hildy out of Massachusetts. Having discovered them in Florida, Massachusetts demanded extradition of the Ellises for kidnaping Hildy (i.e. failing, in contempt of court, to give her up); but Gov. LeRoy Collins refused to render them to Massachusetts. N. Y. Times, May 24, 1947, p. 1. *Cf.* unsuccessful prosecution of Antoinette Brun for not rendering the Finaly boys, pursuant to court order. 1954 Dalloz 672 (Cour de Cass., 1953) and 687 (Cour d'Appel de Riom, 1954).

[45] The Justice Administration of Zürich . . . decided to leave the child in Winterthur till the paternity proceeding [pending in Obwalden] was settled. . . . [After it was withdrawn] on 31 Dec. 1946 the Wardship Authority of Kerns [appointed Bucher] permanent guardian

the suit started by Obwalden, the Tribunal made its legal decision.[46] The court recognized that, as there was federal legislation (the Civil Code) but no federal supervision of the application of the law by the cantons, it was questionable whether the canton of execution of another

(*Vormund*). A request by the Winterthur Wardship Authority for the transfer to it of the wardship was rejected by the Wardship Authority of Kerns and on 15 March 1947 also by the Executive Council of Obwalden; likewise the appeal of Agnes Huber against the appointment of the permanent guardian.

On 22 April 1947 the Obwalden authorities again demanded the transfer of the child to a Catholic institution. Since the foster parents refused to give up the child, of whom they were very fond and who was being well reared by them, and declared that they wished to offer all assurances for the child's Catholic education, the Justice Administration of Zürich asked the Wardship Authority of Kerns to reconsider its decision. After several attempts to reach an agreement had failed, the Justice Administration of Zürich eventually wrote the Wardship Department of Obwalden on 2 July 1948 that it thought that to take the child away from the Keller family, with whom he had lived for 2½ years, would be a heartless and quite unjustified measure, and that it would be able (*könne*) to give no legal help. 75 TF I at 140–141.

Half a year later Obwalden started suit. Before the court made decision,

a delegation of the Federal Tribunal on 13 April 1949 tried in Luzern to bring about a settlement by conferring with (*in Anwesenheit von*) representatives of the executive councils and wardship authorities of the parties and in the presence (*im Beisein*) of the guardian, the foster parents, and the mother of the child. None could be reached. The Obwalden group said that they would place the child in a Catholic family in Kerns, which was ready to adopt him and make him heir (*zum Erbe einzusetzen*). It was also impossible to persuade the foster parents to give the child up voluntarily. . . . 75 TF I at 143.

[46] After referring to *Zürich v. Genève*, 51 TF I 309, and Penal Code art. 352, the court said:

The legal writers (*die Lehre*) agree and the defendant admits that a canton is in principle obliged to give effect to the orders (*Verfügungen*) of the wardship authorities of other cantons. But disputed are the conditions under which commands (*Anordnungen*) of another canton have to be executed. The defendant claims the right (*nimmt das Recht für sich in Anspruch*) to re-examine on their merits the decisions transmitted for execution, while the plaintiff maintains that legal assistance must be furnished without further examination when decisions are duly made by an authority having jurisdiction.

The duty of the cantons to execute orders of other cantons in wardship cases is, by some legal writers, derived from Const. art. 61 ["Final civil judgements rendered in one canton are enforcible throughout Switzerland".] According to the TF decisions (51 TF I at 317; 67 TF I at 10; *cf.* also [Kommentar zum schweizerischen Zivilgesetzbuch II,] Egger, [Familienrecht, Part III,] comment 10 on Civil Code art. 361), however, it is a result of the common law principle (*des ungeschriebenen Grundsatzes*) that all cantons have to help one another to carry out federal law. The conditions for the affording of legal assistance, if one concedes that an unwritten obligation rests on the cantons, are, according to the nature of the case, in principle the same as those of Const. art. 61. Accordingly, the order of the competent authority must be final and valid, and there must have been proper notice (*Danach muss die Verfügung von der zuständigen Behörde ausgegangen und rechtskräftig sein, und es muss eine regelrechte Ladung stattgefunden haben*). The order of the Wardship Authority of Kerns in this case fulfilled the first two requirements without question. Notice to the young ward was impossible. Whether the requirement of notice (*Erforderung der Ladung*) in this situation is inapplicable or necessitates the notification of the interested parties (*Benachrichtigung der Interessierten*) need not be decided, because in any event review under Civil Code art. 420 was available to them. So the decision of the Wardship Authority of Kerns . . . fulfills the conditions generally necessary for intercantonal legal assistance.

The assertion of the defendant [that it may reexamine the merits of the order] can not be acceded to. When a valid decision has been made, the canton asked to execute it may not again adjudge the case; otherwise the jurisdictional provisions of the federal law and [intercantonal] legal assistance would become largely futile. 75 TF I at 143–145.

Civil Code art. 420, referred to in the opinion, reads: The ward if mentally able and any interested person may appeal to the [local] wardship authority against the acts of the guardian. Appeal from the [local] authority's decisions may be made to the supervising authority within ten days after their communication.

canton's order should "in some circumstances not have at least a limited authority to re-examine the order, for instance, to see if it is generally consistent with federal law or rests on principles completely incompatible with federal law." But the court laid the question aside because it thought the decision to take the boy away from the Kellers did not rest on considerations completely foreign to Swiss civil law.[47]

Hans Rudolf is the symbol of a good rule of law serving pious hard-hearted bureaucracy. But, harsh though the particular conclusion may seem, the opinion is full of the glue that has made Helvetia, up to the present century, the only enduring federacy of continental Europe.

We have looked at some of the leading cases involving conflict of competences (a) to tax and (b) to guard the feeble. We have further noted the existence of similar competence controversies relative to (c) territory, (d) punishment of criminals, (e) support of the poor. In the first three categories, conflict is usually positive; in the last two each canton is more likely to assert the *other* party's competence, since competence here is more a debit than a credit, more a burden than an advantage.

In most of the cases of all these types the decision rests directly or remotely on language of the federal Constitution and statutes and of intercantonal treaties. But it is the court that recognizes the status of the canton as party plaintiff in the vindication of its own competence-power or in the attribution to another canton of competence-obligation; and the status of the canton as party defendant in opposing such claims about cantonal jurisdiction. Even here, however, federal statutes supply some support.

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[47] The Civil Code (e.g. art. 277 ["A child's father and mother control his religious education. Agreements that limit their freedom in this respect are void. The child on reaching 16 has the right himself to choose his faith."] and art. 378 [" . . . Regarding religious education of a minor ward, the wardship authority of the domicil asks and follows the instructions of that of the place of origin"]) speaks repeatedly of religious education. . . . Regard for church affiliations in the choice of the foster home does not put the decision completely outside the bounds of federal law, even if the decision perhaps gives too great emphasis to religious education, which is only part of total education, 31 TF I at 633, and accordingly insists too strongly that foster parents and foster child should belong to the same church, although, as here happens, Protestant foster parents declare themselves ready to do everything to assure the child a careful upbringing in the Catholic faith. 75 TF I at 145–146.

But with the conciliatory tone so characteristic of Swiss decisions, the court continues:

Furthermore one must not overlook that the child was brought to Winterthur against the will of his guardian and, when his return was first demanded in 1946, had not yet become part of the lives of his foster parents as he has today. Temporary placement of the child in an institution, according to the latest declarations of the Wardship Authority of Kerns, is not being considered. 75 TF I at 146.

Till recently the Swiss Judicature Act declared:[48]

> Jurisdiction of the Federal Tribunal in public law controversies between cantons is created by a cantonal government's laying a matter before it (*par le fait qu'un gouvernement cantonal le saisit de l'affaire*). . . .

and now it says:[49]

> The Federal Tribunal has jurisdiction in . . . public law controversies between cantons when a cantonal government lays before it a matter which is not specially placed by federal legislation within the jursidiction of the Federal Council.

The problem then is not the drawing of a line between political controversies and legal controversies, for every case that one canton brings against another is ipso facto a legal case. The problem is to determine whether the plaintiff shows an infringement of some interest appropriate for court protection. Is it sufficiently analogous to some court-recognized right of individuals in municipal law or of states in the law of nations? Is it worthy to be deemed a right in the light of Swiss legislation and of the other sources of law from which the court fashions its own custom-built law of relations between cantons? And may this right be asserted against the defendant canton as the bearer of a legal duty? The court wisely avoids general definition of rights and duties of cantons.

One may start with the statement of the article 3 of the Constitution that "the cantons are sovereign in so far as their sovereignty is not limited by the federal constitution." How far, then, by reason of their membership in the Confederation, have their rights characteristic of sovereigns been lessened (or conceivably expanded) and how far have their duties characteristic of sovereigns been altered? Particularly, there is the question: How far has the Confederation displaced the canton as protector or sponsor of interests of its citizens, residents, or ephemeral inmates? In relation to the extra-Swiss world, do they now get this protection and sponsorship solely from the Confederation? In relation to the intra-Swiss but extra-cantonal world, how far have they lost the possibility of "protective" litigation by their canton? The canton, clearly reduced in status, still is a state with standing in court to wage some lawfare on behalf of its folk, and with liability for some behavior of its folk.

It is well established that it has standing to vindicate its competence by suing and defending against the Confederation. Competence conflicts between the nation and the state throw light on those between the

[48] Judicature Act of 6 October 1911, art. 77.
[49] Judicature Act of 16 December 1943, art. 83(b).

states. In one such the Tribunal declared that it could set aside actions of federal political organs even though they had been "decided not on juridical arguments but by political considerations."

This the court said in *Confederation v. Baselstadt.*[50] The issue was whether the Federal Council (herein CF), in the exercise of its power over foreign relations, could enjoin this canton on the German frontier from holding a popular vote on a proposed cantonal law initiated by petition which would forbid the existence there of foreign or domestic national-socialist and fascist organizations.

> If a conflict of competence arises before the TF, it is necesary to decide how great its authority (*Kognition*) is. If it scrutinizes freely the position of the CF in every question of judgement about foreign affairs, it would go outside the judicial sphere and invade by its decision an area which belongs exclusively to the judgement and responsibility of federal political authorities. But if it limits itself to a declaration that the CF has made answer by invoking the interests of the country in foreign relations and that therefore the CF is competent [to forbid balloting on the proposed cantonal law], then in all instances, where the boundary of competence depends on a question of foreign affairs, the question of competence would be decided in favor of the CF. [In that event] there is no room for the TF to decide any substantial conflict of competences. Yet since the TF is generally obligated by Constitution and statute to decide such conflicts, the question of its authority must be answered in an intermediate way. 65 TF I at 118–119.

What it must decide, it said, was whether the CF in holding that foreign relations are affected by the proposed initiated law "has remained within the bounds of a judgment (*in demjenigen Ermessenrahmen*) which is proper according to general standards which are susceptible of judicial examination in passing on such a question." 65 TF I at 119.

Or, to quote a passage (which the court cited) from *X v. Public Prosecutor of Zürich,*[51] what it must decide is whether or not the federal agency "has clearly misused its discretion (*sein Ermessen offenbar missbraucht habe*)." 64 TF I at 374.

To this extent the Tribunal proceeded to review—and sustain—the action of the Federal Council. (It sustained it only as to prohibition of *foreign* organizations, leaving to cantonal determination whether this partial invalidity resulted in invalidating the whole proposed law.)

The rightness of the exercise of the foreign relations power is as "political" a question as one can imagine. But this does not deter the Tribunal

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[50] Confederation v. Baselstadt, 65 TF I 106.

[51] X v. Public Prosecutor of Zürich, 64 TF I 365.

from declaring that this exercise of political discretion has legal limits; too extreme an exercise of power by the CF even in a clearly political area would infringe the legal right of Basel. Thus "political question" and "legal question" differ in this situation only in the degree of exertion of choice, not in the quality of choice exerted, or the purpose of its exertion. Political questions are not necessarily different from legal questions: but there are legal limits, which the Tribunal will enforce, to the discretionary power of a political organ.

Here the Tribunal reviews the decision of the political organ not by the standard of right political conduct (by which the political organ should have acted) but by the standard of law—in this case, of division of competence between the CF with respect to foreign relations and the cantons with respect to the suppression of subversive political groups.[52] Beyond the reach of federal power lie cantonal rights of self-government. While this case is not between cantons, it illustrates how Swiss public (governmental) rights are defined and controlled by suits between public persons (states and their organs).

Much the same subject matter of controversy came to the United States Supreme Court in *Hines v. Davidowitz*,[53] in which the constitutionality of a Pennsylvania statute requiring aliens to register was at stake. There neither the United States nor any federal organ or officer appeared as litigant; nevertheless, the Court heard the views of the United States by the medium of a brief, which the Solicitor General was permitted to submit as amicus curiae. The Court, though it pronounced the invalidation of the state law by the federal foreign relations power in the absence of any federal *executive* action directed against it, took account of a federal statute, undoubtedly valid, that required aliens to register. The Court ruled on whether the existence of this federal law nullified a state law of similar scope. The conflict between "sovereignties" did not take the form of a conflict between executives, as in the Swiss case. Nor was there direct conflict between statutes (i.e. between legislatures). The litigation involving the question whether the state enactment was suppressed by implication by the federal enactment, was initiated by an individual alien. No doubt the question could have been raised in the same way in Switzerland. But the Swiss pattern of suit

[52] Compare the similar treatment of substantive "due process" by the United States Supreme Court, e.g. in the opinion of Justice Frankfurter in Lincoln Union v. Northwestern Co., 335 US 525 (1949).

[53] 312 US 52 (1941). Likewise Pennsylvania v. Nelson, 350 US 497 (1956), where an amicus curiae attorney representing the United States and another representing a number of states were allowed oral arguments as well as briefs.

by the nation against the state would be an innovation in the United States.

So too between states of the federacy. In contrast to the Swiss Tribunal's customary law, the United States Supreme Court fails to acknowledge competence conflict (except territorial) as a basis for suit between states.

But in many intercantonal cases the competence theme is not the only one. And in many more it is not heard at all. Other themes relate to substantive and remedial law, as some of the cases quoted have demonstrated. The issue is: Does the duty allegedly broken run to the plaintiff canton? Or, Is it the defendant canton that committed the alleged default? Or, Was what was done a legal wrong? And if so, What declaratory, reparatory, or mandatory remedies is it appropriate to accord to one canton against another?

In one area of active controversy, to wit, that relating to support of persons who become public charges in cantons other than that of their citizenship (cantonality), these are a few of the issues that have been litigated: What liability has a canton for another canton's cost of maintaining the former's citizen in confinement ordered by the latter (a) for crime (b) for insanity (c) for alcoholism? If a person has multiple cantonality, which canton has, or do all cantons have equally (or on some other basis of sharing), an obligation to provide public assistance when he is in need? Or may he choose which shall be liable? What happens regarding public assistance if different members of a family have different citizenship? To what extent may cantons by intercantonal treaty alter rules that would prevail in the absence of such a treaty? Can such treaties, in the absence of contrary stipulation, be terminated at will by any canton? The answers that the Tribunal has given to these substantive questions in litigation concerning poor relief, as well as others in other fields, must be left to some other occasion.

ALEXANDER C. CASTLES

Compulsory Automobile Liability Insurance in Australasia

THE RECENT enactment in New York of a compulsory automobile insurance law has once more focussed attention on the recurrent arguments for and against compulsion in this field. To Australian and New Zealand lawyers, such arguments are merely of historical interest. For more than a decade, all Australian states and New Zealand have accepted compulsory insurance schemes which generally go further in providing automatic compensation for automobile accident victims than any other jurisdictions in the common-law system, except Saskatchewan. Unlike most of the legislation in the other common-law countries, compensation frequently emerges from the enactments as an end in itself, limited only by the difficulties of financing any improved system, and not by any deeply ingrained desire to retain individual responsibility in the field.

The touchstone of the Australasian legislation was the New Zealand Motor Vehicles (Third Party Risks) Act of 1928.[1] It was viewed by its proponents as an experimental measure, independent of any prior intrusions into the remedial area of liability.[2] The Massachusetts compulsory insurance system, with its retention of a considerable area of individual responsibility, was expressly rejected as the pattern of the New Zealand Act.[3] In his second reading speech in the legislature, the Attorney-General, Mr. F. J. Rolleston, affirmed that the Government believed that the most effective way of dealing with automobile accidents was to provide compensation, wherever possible, for injured road users.[4] The scope of the Act itself confirms that collective responsibility is admitted to be an aim in itself and not merely a palliative to satisfy uncompensated plaintiffs.

The most important feature of the legislation is the extent of the compulsory indemnity requirement. All owners of motor vehicles[5] are required

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[1] Now incorporated in the Transport Act, 1949.

[2] 219 New Zealand Parliamentary Debates, 589.

[3] *Ibid.*, 602.

[4] *Ibid.*, 589.

[5] Including the Crown Transport Act, 1949, section 168.

to take out a policy to cover unlimited damages for personal injuries or death which must indemnify not only the insured's personal liability but that of every person who uses his vehicle.[6] In effect a statutory agency is created, and the practical result is that in every accident where a vehicle is identifiable, the owner's insurance policy extends to accidents giving rise to liability when the vehicle is being driven without his express or implied authority. The wide area of collective responsibility thus created was clearly exemplified in the New Zealand Court of Appeal decision in *Marsh* v. *Absolum* where it was stated that indemnity must be made even where a person who has stolen a vehicle is driving it when an accident occurs.[7]

The wording of the Act has caused some difficulty to the courts in determining how far it can be construed in favor of an injured plaintiff. This argument has centered on whether the legislation goes as far as New Zealand's Workmen's Compensation legislation in providing that "accident" should be interpreted to include intentional or criminal acts. The point has not been finally decided but the preponderance of judicial opinion seems to favor the view that it does.[8]

Other provisions complete a picture of compensation through collective rather than individual responsibility. Insurance companies cannot rely on policy conditions to avoid liability, and, even where the insured has made a false or misleading statement in applying for a policy, indemnity must still be made.[9] A motorist, however, can be fined £100 for such an offence,[10] and the insurance company has a right to recover from the insured the sum for which it has been made liable.[11] The only other circumstances where insurance companies have a right to recover over from the insured, arise where the insured has failed to give written notice to the insurer that he has been involved in an accident[12] or the full premium has not been paid.[13] Motorists are protected against any arbitrary refusal by an insurance company to accept their business by the way in which the insurance contract is made. The premium is paid to the registration author-

[6] Transport Act, 1949, section 70(3).

[7] [1940] N.Z.L.R. 448; [1940] G.L.R. 249.

[8] See for this view: Stewart v. Bridgens [1935] N.Z.L.R. 948, Reed J. at pp. 970–72, Fair J. at pp. 983–85; also Shirley v. MacDougall [1934] N.Z.L.R. 1059, Herdman J. at p. 1072; W. L. Gray and Son v. South Island Motor Union Mutual Insurance Association [1936] N.Z.L.R. 916, Kennedy J. at p. 920; Hurlstone v. Steadman [1937] N.Z.L.R., Ostler J. at p. 733. *Contra:* Myers C. J. and Johnston J., Stewart v. Bridgens, [1935] N.Z.L.R. 948, 964–67.

[9] Transport Act, 1949, section 72(1).

[10] *Ibid.*

[11] *Ibid.*, section 72(2).

[12] *Ibid.*, section 73. See also 8 New Zealand Law Journal, 53.

[13] *Ibid.*, section 79.

ity with the application and payment for a motor vehicle license.[14] The motorist nominates the company[15] he desires to do business with, and the contract of insurance is deemed to be complete on the payment of the premium.[16] If insurers become dissatisfied with the risk entailed in doing business with any motorist, they may make an application to have his driver's license revoked.[17]

The compulsory coverage does not extend to claims made against the insured by family members within the fourth degree of relationship,[18] gratuitous passengers in the insured's vehicle,[19] or persons in the service of the insured.[20] There is coverage, however, for passengers in other vehicles, but this is limited to £5,000 for any one claim or £50,000 for a totality of claims.[21] Each of these limitations does not seriously detract from the over-all compensatory nature of the legislation, but they do prevent it from completely fulfilling its basic aim. Family members were excluded from benefiting under the scheme to prevent collusive claims.[22] Persons in the service of the insured, with very few exceptions, are covered by workmen's compensation. Gratuitous passengers in the insured's vehicle were not included simply on the ground that the Government needed to prune the scheme to keep premiums as low as possible.[23] Property damage claims were not covered by the Act, largely it would seem for similar reasons, and the view held by the Government that most of these claims were of a minor nature which could often be met by motorists themselves.[24]

The greatest defects in the legislation are the failure to deal with the problem of the "hit and run" accident and the uninsured motorist. Within two years of the Act coming into operation in 1930, however, it was recognised that some provisions would have to be made for the "hit and run" situation. On October 27, 1931, an agreement was entered into between the Minister for Transport and New Zealand accident insurers to give

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[14] *Ibid.*, section 69.

[15] This includes the State Accident Insurance Office. Transport Act, 1949, section 67(3).

[16] Transport Act, 1949, section 70.

[17] Transport Act, 1949, section 76.

[18] *Ibid.*, section 70(4)(a).

[19] *Ibid.*, section 70(4)(c).

[20] *Ibid.*, section 70(4)(b).

[21] *Ibid.*, section 70(2).

[22] 219 New Zealand Parliamentary Debates 592. See also Stewart v. Bridgens [1935] N.Z.L.R. 948, Reed J. at p. 973, Smith J. at p. 975.

[23] 219 New Zealand Parliamentary Debates, 593. This is also probably the reason for limiting the liability.

[24] *Ibid.*, 590.

relief,[25] and this agreement now operates in effect as an extension of Part V of the 1949 Transport Act.[26] When a situation arises where an insurer would have been liable if a "hit and run" vehicle had been identified,[27] an injured plaintiff must give notice to the Commissioner of Transport, within seven days of the accident, stating that he intends to make a claim against the insurers, parties to the agreement.[28] The claim is settled by three arbitrators, one appointed by the claimant, another represents insurance interests, and the third is a Stipendiary Magistrate appointed by the Minister of Transport.[29] The arbitrators have no power to make an award to a single claimant exceeding £1,000,[30] and total liability arising from any accident must not exceed £5,000.[31] Each of the New Zealand accident insurers who engage in motor vehicle insurance business contribute to any payments made under the agreement in proportion to their third party premium incomes.[32]

As an experimental venture into providing for the victims of motor accidents, the New Zealand legislation set a new standard in giving certain recovery and collective responsibility by motorists. Unfortunately, no real attempt has been made to review the initial legislation to fill the loopholes that were left. The limitation on compulsory coverage for gratuitous passengers, failure to provide adequately for the "hit and run" accident, or for the situation where a motorist is uninsured, has left the New Zealand position an incomplete fulfilment of the aim of compensation for all automobile accident victims, injured by fault, submitted as the rationale of the original 1928 legislation. Nevertheless, this is the first important recognition in the common-law system that collective responsibility, in itself, can be an aim of motor accident law, and the removal of almost all standard insurer defenses in the field covered by the legislation makes collective responsibility a reality there.

During his second reading speech, Mr. F. T. Rolleston prophetically replied to an interjector that other countries would follow New Zealand's lead in providing similar legislation.[33] The New Zealand enactment became the basic foundation for compulsory insurance legislation in each of the Australian states.

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[25] 1931, New Zealand Government Gazette, 3023.

[26] Chalmers and Dixon, Road Traffic Laws of New Zealand (2nd ed., 1952) 465.

[27] Clause 1.

[28] Clause 2. In special circumstances the period may be extended up to a maximum of 14 days, Clause 3.

[29] Clause 8.

[30] Clause 16.

[31] Clause 17.

[32] Clause 21.

[33] 219 New Zealand Parliamentary Debates 595.

In Australia, however, the state legislatures were slow to follow the implementation of the compulsory automobile insurance schemes in Great Britain and New Zealand. It was not until Western Australia passed the Motor Vehicles (Third Party Insurance) Act of 1943[34] that all Australian states provided for compulsory automobile insurance. In 1934, there was an abortive attempt to pass such a bill in Victoria. It was supported in principle by all political parties represented in the Legislative Assembly and easily passed all stages in that chamber.[35] The bill, however, became bogged down in the Legislative Council and was finally shelved.[36] The first successful move was made in Tasmania with the introduction of compulsory automobile insurance in the Tasmanian Traffic Act of that year.[37] This was followed in 1936 by the implementation of compulsory schemes in South Australia[38] and Queensland.[39] After the initial rejection of compulsory insurance, agitation continued in Victoria for some measure to alleviate the plight of successful plaintiffs unable to recover damages awarded to them. A private member's bill in much the same terms as the 1934 bill was rejected by the Legislative Assembly in 1936. It was not until 1939 that compulsory insurance was accepted by both branches of the Victorian legislature in the form of the Motor Car (Third Party Insurance) Act, 1939.[40] New South Wales came into line with the Motor Vehicles (Third Party Insurance) Act, 1942,[41] and Western Australia followed a year later.[42]

Like New Zealand's Motor Vehicles (Third Party Risks) Act,[43] all of the Australian enactments give far more protection to injured automobile accident victims than that provided in most other jurisdictions of the common-law system. Prime responsibility is vested in all automobile owners who must take out liability policies for certain prescribed minimum amounts. As a result, when an automobile owner avails himself of the opportunity to use or operate a car he becomes collectively responsible with his fellow automobile owners for certain injuries which might be

[34] No. 32 of 1943.

[35] 1955 Victoria Motor Car Act No. 5915 of 1955.

[36] 193–194 Victorian Parliamentary Debates, 1780. The debate was adjourned in the Council and not resumed.

[37] Inserted into the Traffic Act 1925 (No. 38 of 1925) by section 2 of the Traffic Act 1935. Incorporated under the provisions of the Statute Law Revision Act 1934 as sections 62–77 of the principal enactment. Originally Part VII of the Traffic Act, 1925, it is now incorporated as Part IV.

[38] Road Traffic Amendment Act 1936. No. 2332 of 1936. Now Part IIA of the Road Traffic Act 1934–1954.

[39] Motor vehicles Insurance Act of 1936, 1 Edw VIII, No. 31.

[40] No. 4688. Now Part V of the Motor Car Act, 1951, No. 5616.

[41] No. 15 of 1942.

[42] See *ante*, footnote 34.

[43] 1928, c.52.

inflicted by any car on the road. Least coverage is required in Tasmania,[44] whilst New South Wales goes beyond merely providing for personal injuries or death and gives some compulsory protection for injuries to property.[45] The rights of insurance companies to avoid liability in the field covered by the Acts is strictly limited, and, although all states give certain rights of recovery over to the insurers, the degree of absolute collective responsibility is quite considerable. Victoria, in particular, has made collective responsibility a virtual correlative of the aim of compensation articulated in its legislation.

The first two states to introduce compulsory insurance, Tasmania and Queensland, tried to set a balance between the British and New Zealand schemes and showed little legislative initiative in their resulting enactments. The ever-present political necessity to ensure that premiums were kept as low as possible and to overcome opposition from strong insurance lobbies, combined with a failure to probe adequately the limitations in the British and New Zealand acts, placed strictures on the fields covered by their legislation.

In Tasmania, the compulsory coverage only extends to the use of an automobile with the authority or acquiescence of the insured owner.[46] The minimum compulsory liability required is only £2,000 in respect of claims for personal injuries or death made by one person or £20,000 in respect of all such claims arising out of the same accident.[47] No coverage is necessary for servants injured in the course of their employment, persons living with the insured or his agent as a member of the family, or for gratuitous passengers.[48] No condition in the policy which purports to absolve the insurer from liability can operate to defeat a successful plaintiff's right to recovery within the limits of the compulsory coverage.[49] This does not prejudice, however, the insurer's right of recovery over against the insured for breach of any policy condition or nondisclosure or fraud.[50] In addition, insurance companies are empowered to apply for the suspension of a driver's license.[51] To prevent exploitation of motorists by insurers, provision is made for the control of premium rates.[52]

The Queensland Motor Vehicles Insurance Acts[53] have similar limita-

[44] See *post*.
[45] See *post*.
[46] Traffic Act, 1925, section 63(2).
[47] *Ibid.*, section 63(2)(1).
[48] *Ibid.*, section 64(2)(ii).
[49] *Ibid.*, section 65(1).
[50] *Ibid.*, section 65(2).
[51] *Ibid.*, section 4(a)(2).
[52] *Ibid.*, sections 74–77.
[53] 1936–1945.

tions to those in Tasmania. No attempt has been made to give recovery to the victim of the "hit and run" accident or the uninsured motorist. The initial enactment also failed to provide for the situation where the defendant could not be served with process. This has been rectified by the Motor Vehicles Insurance Acts, Amendment Act of 1944;[54] since when judgment in such circumstances may be had directly against the insurer.[55] The limit on the insurer's liability, however, is only £750.[56]

These limitations are largely overshadowed by the fact that the Acts require all motorists to hold unlimited liability policies indemnifying against unlimited damages for all[57] personal injuries or death arising out of the use of the insured's automobile, whether with his express permission or not.[58] An insurance company cannot avoid liability on the grounds of misstatement or nondisclosure, breach of a policy condition or warranty, or failure to comply with the Act or policy provisions in relation to what an insured may be required to do after an accident has occurred.[59] The Acts give a regulation-making power to prescribe the form of policies which comply with the Act.[60] The standard policy now provided by regulation[61] gives insurers the right to rely upon a number of contractual breaches to obtain a right of recovery over against the insured.[62]

In contrast to the legislatures of Tasmania and Queensland, the South Australian Parliament showed far more enterprise in dealing with the problem of the uncompensated plaintiff in the Road Traffic Amendment Act of 1936.[63] The basic foundation of the legislation was the New Zealand

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[54] 8 Geo VI, No. 5.

[55] 8 Geo VI, No. 5, Section 3. Now section 4A, Motor Vehicles Insurance Acts, 1936–1945.

[56] Motor Vehicles Insurance Acts, 1936–1945, section 4 A (4)(b).

[57] This includes gratuitous passengers, family members, and servants, injured by or riding in, the insured's automobile. In the case of servants within the meaning of the Queensland Workers' Compensation Acts, 1916–1939, Section 2A of the Motor Vehicles Insurance Acts, (inserted by section 3(b) of the Insurance Acts and Another Amendment Act of 1940), provides that any compensation under the Workers' Compensation Acts in respect of which the State Insurance Commissioner is entitled to be indemnified by such owner or his estate shall be damages within the meaning of the Motor Vehicles Insurance Acts.

[58] Motor Vehicles Insurance Acts, 1936–1945, section 3.

[59] *Ibid.*, section 4(a)(2).

[60] *Ibid.*, section 9(1)(a).

[61] Set out in schedule 3 of the Motor Vehicles Insurance Regulations of 1937.

[62] These include misstatement, misrepresentation, suppression or nondisclosure of material facts, driving a vehicle in an unsafe condition, driving while intoxicated, using a vehicle in breach of statute or regulation, racing, pace-making or competing in a reliability, speed, or other trial, using a vehicle for a purpose not declared in the policy, or using it in such a manner as to bring it within a class for which an additional premium should have been paid. The provisions ***do not*** operate where the vehicle is used without the knowledge or consent of the owner.

[63] No. 2332. Inserted as Part IIA of Road Traffic Act, 1934–1936; now Part IIA of the Road Traffic Act, 1934–1954.

enactment with a number of borrowings from the British Road Traffic Acts.[64] To ensure that insurers were made primarily responsible for all valid negligence claims for personal injuries or death, South Australia made a unique contribution to compulsory automobile insurance law by statutorily recognising the claims of victims of "hit and run" motorists. Section 70d(3) provided that where the identity of a vehicle involved in an accident could not be discovered, the victim could recover against a "nominal defendant" appointed by the State Treasurer, if he could prove that he would have succeeded in the same circumstances if the identity of the vehicle was known. The "nominal defendant's" liability is unlimited, and insurers, approved as liability carriers under the Act, were appointed to meet the cost of such claims for which any "nominal defendant" was made liable.[65] For the first time in Australia, South Australia also provided for immediate payments, without proof of fault, for emergency medical treatment. Insurers are bound to meet claims by doctors and registered nurses,[66] and make payments for hospital treatment.[67]

The original Act contained a number of defects which detracted from the over-all efficacy of the scheme. The initial coverage only applied to accidents within the state,[68] but this was extended to any accident in the Commonwealth in 1943.[69] At first compulsory coverage did not extend to relatives to the fourth degree of relationship,[70] servants of the insured,[71] or gratuitous passengers in the insured's car.[72] These limitations were also removed in 1943,[73] and the compulsory minimum coverage of £2,000 for

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[64] See Road Traffic Act 1934–1936, Sections 70b(1),(5); 70c(1); 70d(1),(8); 70e(1); 70g(1); 70h(1).

[65] Road Traffic Act, 1934–1936, Section 70d(7). To facilitate the operation of this section, Act 2416, 1938, section 27, empowered the State Treasurer to make the initial payment of damages to the successful plaintiff and then call upon the insurers to meet the claim by a payment into the Treasury. In 1939, Act 45, section 19(b), now section 70d(7a) of the Road Traffic Act, 1934–1945, empowered insurers to organise a scheme through which claims could be met directly by an association of motor vehicle insurers. The South Australian insurers now meet these claims through a pool which is administered by a committee set up by the insurers themselves to control the payments.

[66] Road Traffic Act, 1934–1954, section 70g.

[67] *Ibid.*, section 70h. The payments are payable pursuant to Part VI of the Hospitals Act, 1934–1951.

[68] Road Traffic Act, 1934–1936, section 70c(1)(b).

[69] No. 35, 1943., section 13. Now incorporated in Road Traffic Act, 1934–1954, section 70c(1) (b).

[70] Road Traffic Act, 1934–1936, section 70c(2)(b)(i).

[71] *Ibid.*, section 70c(2)(b)(ii).

[72] *Ibid.*, section 70c(2)(b)(iii).

[73] No. 35, 1943, section 13(3).

passenger liability[74] was raised to £4,000 in 1951.[75] The provisions of the Act which abrogated insurers' defence, insofar as they would otherwise deny a successful plaintiff recovery,[76] were further strengthened by voiding any contracts which purported to exclude a particular person's possible negligence claim[77] and making an insurer liable wherever he had issued a policy, notwithstanding the fact that the insured had not agreed to, or had not paid the requisite premium.[78] The one major bar which now remains in the area covered by the compulsory coverage is that no express provision has been made for the case of the uninsured motorist. This means that an accident victim may be better off if injured by an unknown driver unless the uninsured motorist is a man of means. The only protection given consists of a criminal sanction imposed on any automobile owner who has not taken out a statutory policy[79] and the virtual impossibility of obtaining automobile registration without proof that a policy has been obtained.[80]

Although this legislation recognized that automobile owners are collectively responsible for all motor accident claims, there remains a considerable area where individuals may be made ultimately responsible at the suit of an insurer. The abrogation of insurers' defences in respect to a third party's claims does not prevent an insurer from obtaining recovery over for breach of a term of an insurance contract or for misstatement or nondisclosure.[81] Failure to carry out the procedure laid down for reporting an accident or compromising a claim without the consent of the insurer can also lead to an insurer recouping some or all of the damages he has paid out on the insured's behalf.[82] Insurers have also been given a direct right of recovery against the unauthorized user of an automobile on whose behalf they have had to bear a loss.[83] Where an insurer is dissatisfied with the risk entailed in any driver being on the road, an application may be made to a court of summary jurisdiction to have that per-

[74] Road Traffic Act, 1934–1936, section 70c(2)(a), which also set a maximum compulsory liability of £20,000 for a totality of claims made by passengers, arising out of any one accident.

[75] No. 48, 1951, section 18, which also made the compulsory coverage for the totality of claims unlimited.

[76] Road Traffic Act 1934–1954, sections 70d(4)(a),(b),(c).

[77] No. 2416, 1938, section 30; now section 70p, Road Traffic Act, 1934–1954.

[78] No. 17, 1942, section 5; now section 70ba, Road Traffic Act, 1934–1954.

[79] Road Traffic Act, 1934–1954, section 70b(1).

[80] *Ibid.*, section 70b(6).

[81] *Ibid.*, section 70d(5). An approved insurer may also apply to a court of summary jurisdiction to have driving licenses cancelled, section 70k.

[82] *Ibid.*, section 70e.

[83] *Ibid.*, section 70da.

son's driving license cancelled.[84] No policy can be terminated, however, without due notice to the insured and the Registrar of Motor Vehicles.[85] The termination of the policy after notice automatically makes the motorist's car unregistered.[86]

Although late in the field with compulsory insurance for all automobiles, the Victorian Parliament made up for its tardiness and vacillation by the exhaustive nature of the legislation it passed. The principle of compulsory automobile insurance was no newcomer to the Victorian statute book, which explains in part the rejection of the two over-all compulsory insurance bills. The Motor Car (Third Party Insurance) Act of 1939[87] replaced two earlier statutes which provided that certain classes of motor buses should carry liability policies, in limited amounts, for personal injuries or death.[88] Victoria went even further than South Australia in recognizing the responsibility of the aggregate of automobile owners for death and injury on the roads.

The debate on the measure in the Legislature Assembly clearly showed that the legislators considered that compulsory insurance led to a rejection of deterrence or retribution as the main aim of motor accident law.[89] In introducing the bill, the Chief Secretary, Mr. Bailey, averred that its aim was to make pecuniary compensation certain for every person who had a valid claim at law for personal injuries or death.[90] He stated that the use of automobiles was a dangerous enterprise and the state had a duty to protect its citizens. This was to be done by enforcing collective responsibility among automobile owners to accident victims.[91] Mr. Bailey doubted the efficacy of compulsory insurance laws which attempted to stress the aim of compensation and yet still pay lip service to deterrence by including onerous provisions to foster safer driving.[92] As a result, he proposed that the third party policies under the new Act were to be permitted to contain "only the barest minimum of those restrictive and invalidating conditions which attach to ordinary insurance policies".[93] Collective responsibility was to be enforced for every automobile accident resulting in a valid claim, whether the car could not be found, was unregistered or

[84] *Ibid.*, section 70k.
[85] *Ibid.*, section 70k(3).
[86] *Ibid.*, section 70k(4).
[87] No. 4688. Now incorporated as Part V in the Motor Car Act 1951.
[88] Motor Omnibus Act, 1928, No. 3742; Transport Regulation Act, 1933, No. 4198.
[89] 207 Victorian Parliamentary Debates, 698ff, 735ff; 760, 933, 1080, 1516, 1537.
[90] 207 Victorian Parliamentary Debates, 228.
[91] *Ibid.*, 228.
[92] *Ibid.*, 230.
[93] 207 Victorian Parliamentary Debates, 229.

uninsured. The only limitation on damages was to be in the case of passengers. In such a situation, compulsory coverage was to extend only to £2,000. The reason for this restriction was not made clear, but it seems that it was inserted to discourage such claims being excessive or collusive and similarly to New Zealand to keep premiums as low as possible.[94] Mr. Bailey also proposed that claims by relations to the second degree of relationship should not be covered because of the possibility of collusion, but this view did not prevail and no such provision was embodied in the final enactment.

In its final form, the Victorian Act contained an assimilation of those features of the New Zealand, British, and South Australian legislation[95] which best emphasized compulsory insurance as a means of enforcing a high degree of absolute collective responsibility amongst automobile owners. Each automobile[96] is required to be covered by a contract of insurance[97] for all claims, without limit,[98] for personal injuries or death[99] arising out of its use.[100] All contractual conditions which purport to negative, limit or modify an insurer's liability for the compulsory coverage

[94] See *ante*, footnote 23.

[95] Ten sections were taken from the New Zealand Motor Vehicles (Third Party Risks) Act, 1928, and adapted for use in Victoria. Eight were similarly taken from the South Australian Road Traffic Act, 1934–1936 and four from the British Road Traffic Acts, 1930 and 1934.

[96] Part V of the 1951 Motor Car Act binds the Crown, section 38(1). There is one exception to the requirement (section 39(1)(b)) that all automobile owners must enter into a contract of insurance. Section 39(3) exempts the Melbourne and Metropolitan Tramways Board, which operates Melbourne's extensive tram and bus services, from being required to enter into insurance contracts for its vehicles. The Board, however, is liable to fulfil all other obligations under the division (section 39(3)(b)) and is required to make annual payments to the Motor Car (Hospital Payments) Fund (see *post*, section 39(3)(b).

[97] Motor Car Act, 1951, section 39(b).

[98] With the exception of passengers for which the statutory coverage is only required to be £2,000, Motor Car Act, 1951, section 44(2)(a). This section is similar to the South Australian but couched in different terms than the New Zealand provision which provides that the limitation on liability applies when death or bodily injury results to any person "who was at the time of the accident in respect of which the claim has arisen being conveyed in the motor vehicle, or was driving, or entering or alighting from, or about to enter or alight from the motor vehicle", Transport Act, 1949, section 70(4)(c). The absurdity of the New Zealand position was exemplified in Stewart v. Bridgens, [1935] N.Z.L.R. 948, where a constable who jumped on to the running board of a car to arrest the driver who had stolen it, was held to come within the section. In Victoria, the policy is also not required to cover injuries to the owner or driver himself (section 44(2)(b)) nor indemnify against any claim arising out of a contract unless the liability is such that it would have arisen in the absence of the agreement (section 44(2)(c).).

[99] Motor Car Act, 1951, section 39(1)(a).

[100] *Ibid.*, section 39(1)(a). There is no direct decision on the point but it would seem that this provision clearly covers the situation where the car is driven by a third party, the same as in New Zealand, Marsh v. Absolum, [1940] N.Z.L.R. 448. See also, Waugh v. Waugh 50 S.R.(N.S.W.) 210, 212, per Jordan C. J.; footnote 156.

are void and have no effect whatsoever.[101] The South Australian "nominal defendant" provisions were incorporated to deal with "hit and run" accidents[102] and extended to deal with uninsured vehicles.[103] Under the original Act the Chief Secretary named a nominal defendant[104] after consultation with authorized insurers,[105] who then bore the liability in proportion to their premium incomes.[106] This procedure caused some embarrassment to the Secretaries of the Accident and Insurance Underwriters

[101] *Ibid.*, section 63(1). Only in two situations has the insurer a right to recover over against an insured, see *post.*

[102] *Ibid.*, section 47(1). A proviso to the section to the effect that no judgment could be obtained unless the plaintiff gave notice of his claim "as soon as possible" to the Chief Secretary, was added to the original South Australian provision. South Australia added a similar proviso to section 70d(2) of the Road Traffic Act in No. 48, 1951, section 19(a).

[103] *Ibid.*, section 48. In this situation, however, the claim cannot be made against a nominal defendant until one month after the successful plaintiff has obtained judgment and the judgment has not been satisfied in part or in full for liability covered by the compulsory insurance provisions. It is not necessary to give a notice of intention that a claim is to be made as in the "hit and run" situation. Johnson v. Stephens (1951), 51 S.R.(N.S.W.) 320.

[104] Almost invariably the Secretary of the Victorian Accident and Insurance Underwriters Association.

[105] Motor Car Act, 1951, section 51(1). No insurer is permitted to carry on compulsory insurance business under the terms of the Act unless he is authorized to do so by the Chief Secretary. This provision is in the Act to protect automobile owners from the possible failure of insurers to meet their commitments by giving a degree of governmental supervision over their activities in the motor vehicle insurance field. Section 40 of the Act sets out the manner in which insurers can obtain this authorization. All other Australasian jurisdictions, except Tasmania, have somewhat similar provisions.

New Zealand: Transport Act, 1949, section 68. Authorized insurers are companies within the meaning of the Accident Insurance Act, 1908, who have given notice of their willingness to conduct motor vehicle insurance business.

Queensland: Motor Vehicles Insurance Acts, 1936–1945, section 2. A "licensed insurer" is an insurer licensed by the Treasurer to carry on general insurance business in Queensland.

South Australia: Road Traffic Act, 1934–1954, section 70a(1). An "approved insurer" is any person or association approved by the Treasurer to carry on this type of business.

New South Wales: Motor Vehicles (Third Party Insurance) Act, section 14. This copies the Victorian provisions.

Western Australia: Motor Vehicles (Third Party Insurance) Act 1943, section 5. Under this provision insurers could apply to the Minister to become "approved insurers." If they were not approved for the purposes of section 10 of the Workers Compensation Act, 1912–1941, approval might be refused or granted only subject to certain conditions. Section 10 required insurers to enter insurance contracts on "reasonable terms" as determined by a statutory committee (section 5). This provision was repealed by Act. No. 31 of 1948, section 7, on the formation of the Western Australian Motor Vehicles Insurance Trust, see *post.*

In Tasmania, any insurer lawfully carrying on accident insurance business in the state is permitted to issue policies under the Act. See Road Traffic Act, 1925, section 62.

[106] Motor Car Act 1951, section 51(2). To facilitate the operation of the Nominal Defendant provisions of the Motor Car Act authorized insurers have yearly appointed a "Nominal Defendant Committee" to act on their behalf on all matters concerning the appointment of nominal defendants and to apportion the sums needed from authorized insurers to meet such judgments and costs that may be made against nominal defendants.

Association as it is also their task to announce premium rises and other insurance information which may be unpalatable to the general public. As a result, insurers felt that the identification of the Secretary in court proceedings could lead jurymen to have a propensity to decide against him.[107] The Victorian legislature amended the procedure in the Motor Car (Amendment) Act 1955,[108] which now enables these actions to be brought against "The Incorporated Nominal Defendant" who represents insurers in these actions.[109] Section 4(1)(a) gives the Chief Secretary power to appoint a person to be "The Incorporated Nominal Defendant," who with his successors in office is to be a body corporate under that name.[110]

The undoubted importance of the Victorian legislation as a milestone in the history of legislative intervention into highway accident law lies in the area of absolute collective responsibility which it imposes. The inroads on the "fault" concept are wide and decisive. All motorists are collectively responsible for the "hit and run" accidents and are ultimately liable for the failure of any uninsured motorist to meet a judgment against him.[111] The elimination of insurer defences[112] abrogates fault as the touchstone of liability in almost all circumstances covered by the compulsory coverage. In only three instances, do insurers have a right of recovery over. Recovery over can be had against an unauthorized driver[113] or a driver who was drunk when the accident giving rise to liability occurred.[114] The Act makes it mandatory for drivers to give insurers notice of all accidents affecting the insured's automobile which result in death or bodily injury.[115] Failure to do so gives an authorized insurer the right to recover, in the form of damages, such amount as may be reasonably attributable to the failure to comply with this section in any action which has resulted in the insurer having to make a damages payment on behalf of the insured.[116]

The heavy burden placed on insurance companies to meet all claims covered by the statutory coverage is not lessened by the choice they have

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[107] For a discussion of this and other problems related to the Victorian Nominal Defendant provisions see Castles, "Legislative Reform of the Nominal Defendant Provisions of the Motor Car Act," 7 Res Judicatae (1955) 153.

[108] As yet unnumbered.

[109] The new Act copies provisions inserted into the original New South Wales Motor Vehicles (Third Party Insurance) Act, 1942. See Division 4, and in particular section 29.

[110] Motor Car (Amendment) Act 1955, section 4(1)(b).

[111] If the motorist is later found, there might be a chance of recovery over. See *post* and Motor Car Act, 1951, section 63(1).

[112] Motor Car Act, 1951, section 63(1).

[113] *Ibid.*, section 56(1).

[114] Motor Car Act, 1951, section 56(2).

[115] *Ibid.*, section 54.

[116] *Ibid.*

in selecting the risks they will take. The original legislative scheme proposed that all policies should be effected through the registration authority, similarly to New Zealand. Under pressure from insurance interests, who believed that such a provision would take a considerable portion of business to the State Accident Insurance Office, the legislature agreed to a compromise. An automobile owner may pay his premium personally to an authorized insurer[117] and must then deliver a copy of his certificate of insurance to the Chief Commissioner of Police[118] before automobile registration will be made.[119] Alternatively, he may pay his premium to the Chief Commissioner of Police before or with the payment of his automobile registration fee.[120] The motorist nominates an authorized insurer with whom the contract of insurance is to be made,[121] and after the deduction of administrative expenses, the Commissioner forwards the premium to the insurer,[122] who must then issue an "Act" policy.[123] To further protect motorists from discrimination,[124] the 1939 enactment empowered the State Government to form a State Motor Car Insurance Office to be an authorized insurer.[125] All of the Australasian states, except South Australia, now have state-operated insurance corporations operating in competition with private concerns in the motor vehicle insurance field.[126] Further protection is also afforded by the formation of a Pre-

[117] *Ibid.*, section 41(1)(b).

[118] The Chief Commissioner of Police in Victoria is the designated licensing authority for the issue of automobile and driving licenses throughout the State.

[119] Motor Car Act 1951, section 41(4)(b).

[120] Motor Car Act, 1951, section 41(1)(a). As in New Zealand payment by this method results in the contract of insurance being deemed to be entered into on the payment of the premium. Motor Car Act, 1951, section, 41(7)(a). For New Zealand, see Transport Act, 1949, section 70.

[121] Motor Car Act, 1951, section 41(1)(b).

[122] *Ibid.*, section 42(1).

[123] *Ibid.*, section 42(3).

[124] See the Chief Secretary's second reading speech on the bill. 207 Victorian Parliamentary Debates.

[125] Motor Car (Third Party Insurance) Act, 1939, section 36. The office was formed by an Order-in-Council published in 1940 Victorian Government Gazette, 4336. For the Office's present statutory authority see Motor Car Act, 1951, section 69ff.

[126] Queensland: The State Insurance Commissioner is a "licensed insurer" and is expressly referred to in section 3(1) of the Motor Vehicles Insurance Acts, 1936–1945, as an insurer for the purpose of the Act.

Tasmania: Traffic Act, 1925, section 62, provides that the Government Insurance General Manager can carry on third party automobile insurance business.

New South Wales: The Government Insurance Office is an "authorised insurer," Motor Vehicles (Third Party Insurance) Act 1942, section 14(1).

Western Australia: The State Government Insurance Office was an "approved insurer" under the original Motor Vehicle (Third Party Insurance) Act, 1943, section 3, and is now a

miums Committee of six members, consisting of representatives of authorized insurers, the State Insurance Commissioner, and the owners of automobiles, which recommends maximum rates of "act" premiums to the Governor-in-Council.[126a] Because of these provisions, insurers are given some measure of protection by being empowered to apply to a court of petty session for the suspension, on the ground of public danger, of a driver's license.[127] Deterrence is also served by creating it an offence to make a false statement for the purpose of effecting a contract of insurance.[128]

The enactment also carries to a stage further the provisions initiated in the British Road Traffic Acts for payments for emergency treatment[129] and hospitalization.[130] Claims for emergency treatment can be made against the insurer not only by medical practitioners[131] and registered nurses[132] but also by any registered pharmaceutical chemist,[133] without proof of fault. Payments are also required to be made by the authorized insurers for treatment in hospitals.[134] A completely new innovation was provision for a compulsory levy on all premiums for payment into a Motor Car (Hospital Payments) Fund.[135] The levies, which must not exceed one shilling from each premium,[136] are distributed from the Fund to meet capital expenditures by public hospitals which have set aside separate accommodation for the treatment of automobile accident vic-

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member of the Motor Vehicles Insurance Trust, Motor Vehicles (Third Party Insurance) Act, 1943, as amended by No. 31 of 1948, section 4 and No. 40 of 1951, section 3.

New Zealand: The Government Accident Insurance Office is expressly included in the New Zealand scheme by Section 67(3) of the Transport Act, 1949. See also, Motor Car (Third Party Risks) Act, 1928, section 3.

[126a] Motor Car Act, 1951, section 66. There is a similar committee in South Australia to inquire into premiums (Road Traffic Act, 1934–1954, section 70m) which has all of the powers of a Royal Commission (Section 70m(4)). In New South Wales, the Governor-in-Council is empowered to set maximum rates of premiums (Motor Vehicles (Third Party Insurance) Act, 1943, section 33(1)). Western Australia originally had provision for a committee similarly to Victoria and South Australia (Motor Vehicle (Third Party Insurance) Act, 1943, section 26). This has now been replaced (No. 31 of 1948, section 23), and the Motor Vehicles Insurance Trust is required to provide such information as requested by the Minister on premiums and other matters (No. 31 of 1949, section 25).

[127] Motor Car Act, 1951, section 26. In practice, however, this provision is rarely utilized.

[128] *Ibid.*, section 41(11).

[129] Road Traffic Act, 1934, section 16.

[130] Road Traffic Act, 1933, section 33.

[131] The position in England.

[132] The extension made in South Australia.

[133] Motor Car Act, 1951, section 58.

[134] *Ibid.*, section 57(1).

[135] Motor Car Act, 1951, section 43.

[136] *Ibid.*, section 43(1).

tims[137] and to other public hospitals for expenses not met during each financial year for their treatment of such victims.[138]

Neither New South Wales, nor Western Australia, were willing to impose such a high degree of absolute collective responsibility on motorists in their compulsory insurance legislation. The New South Wales Motor Vehicles (Third Party Insurance) Act, 1942,[139] imposes the initial burden for actionable personal injuries or death caused by automobiles, on motorists collectively, in much the same way as in Victoria. The State is bound;[140] provisions in an insurance agreement which negative or limit the compulsory liability are void;[141] certain insurer defences are not available against third parties;[142] and there is a presumption of agency whenever the insured vehicle is used with or without the insured's consent.[143] There are provisions for actions against "The Nominal Defendant," acting on behalf of "approved insurers," where unidentified or uninsured vehicles are involved in accidents,[144] and a right of direct action against insurers where the insured person is dead or cannot be served with process.[145] The New South Wales enactment goes further than the Victorian in making the compulsory coverage for passengers unlimited.[146] The coverage is also increased in the case of motor omnibuses which are not allowed on the road without a compulsory coverage of £1,000 for damage to property, in addition to the other requirements of the Act.[147] The Victorian emergency treatment provisions were widened to provide that payments are to be made by authorized insurers or "The Nominal Defendant" to doctors, masseurs, nurses, or dentists, who carry out reasonably necessary treatment for an automobile accident victim.[148] Ambu-

[137] *Ibid.*, section 43(4)(a).

[138] *Ibid.*, section 43(4)(b).

[139] Act. No. 15, 1942, as amended by Act No. 59, 1951.

[140] *Ibid.*, section 11.

[141] *Ibid.*, section 19.

[142] *Ibid.*, section 15(3). They are fraudulent or material misrepresentation or nondisclosure, breach of any term, condition, or warranty in the third party policy, or failure to comply with a provision in the Act.

[143] *Ibid.*, section 16. "Even if it were an imbecile thief who was driving at the time the accident occurred, the owner is still liable . . ."—Street C. J., Waugh v. Waugh, 1950 S.R. (N.S.W.), 210, 212.

[144] *Ibid.*, Division 4, section 29–32.

[145] *Ibid.*, section 15(2).

[146] The third party policy, however, does not have to extend to liability to pay compensation under the Workers' Compensation Acts, nor liability which may be incurred under an agreement, unless the liability is of such a nature that it would have arisen in the absence of such agreement. Motor Vehicles (Third Party Insurance) Act, 1942, sections 10(2)(a)(b).

[147] Motor Vehicles (Third Party Insurance) Act, section 28(2)(b).

[148] *Ibid.*, section 25(1)(b).

lance authorities[149] and hospitals[150] may also make claims for the cost of treatment or transport against authorised insurers or "The Nominal Defendant" before any liability has been found at law.[151]

The New South Wales Act does not go quite as far as its Victorian counterpart in protecting the motorist against discrimination by an insurer. Premiums are set by regulation,[152] but there is no general provision by which motorists can effect insurance without personally approaching a private insurer. The motorist, however, is given the right to appeal to a District Court or a Court of Petty Sessions against the refusal of an insurer to issue or renew a policy, or to cancel an existing policy.[153] In addition, a motorist may nominate the Government Insurance Office as his authorized insurer and pay the premium, together with his registration fee, to the licensing authority.[154]

The degree of collective responsibility is less than in Victoria. Under section 15(4) the authorized insurer may recover over from the owner of the insured vehicle where there has been any false statement, misrepresentation, or nondisclosure in obtaining the third party policy;[155] or a breach by the insured of any term, condition or warranty in the policy; or failure to comply with any duty set by the Act.[156] The right of recovery over is limited to such false statements, misrepresentation, or nondisclosure which would influence a prudent insurer in accepting a proposal. Breach of the agreement only gives a valid right of recovery over insofar as such breach or failure contributed in a material degree to the accident in question.[157]

In Western Australia, there were three unsuccessful attempts[158] to

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[149] Within the meaning of the Ambulance Act 1919. Motor Vehicles (Third Party Insurance) Act, section 24.

[150] Incorporated under the Public Hospitals Act, 1929, or private hospitals registered under the Private Hospitals Act, 1908, Motor Vehicles (Third Party Insurance) Act, section 24.

[151] Motor Vehicles (Third Party Insurance) Act, section 25(1)(a). The maximum sums which can be claimed under these sections are set by the Motor Vehicle (Third Party Insurance) Regulations. For hospital treatment see Regulation 10. For Ambulance service, Regulation 11.

[152] *Ibid.*, section 33(1).

[153] Motor Vehicles (Third Party Insurance) Act, 1942, section 13.

[154] *Ibid.*, section 8(1)(b). Where no nomination is made a certificate of insurance must be produced before registration will be effected.—section 8(1)(a).

[155] *Ibid.*, section 15(4)(i).

[156] *Ibid.*, section 15(4)(ii).

[157] *Ibid.*, section 15(4)(c)(a).

[158] Parsons, "Death and Injury on the Roads," 3 University of Western Australia Law Review (1955) 201,210. The attempts were unsuccessful largely because of differences on the role to be played by the State Government Insurance Office in the compulsory scheme.

introduce compulsory automobile insurance before the passing of the Motor Vehicle (Third Party Insurance) Act of 1943.[159] At first, the legislators were happy to follow what they considered to be the best provisions of the South Australian and Victorian enactments. All successful legal claims for personal injuries or death arising out of any use of an insured vehicle were covered by the compulsory coverage,[160] with the notable exception of gratuitous passengers who were not brought into the compulsory scheme at all. This anomaly was soon rectified by an amendment in 1944[161] which followed South Australia and Victoria in enforcing coverage up to £2,000 for single claims by gratuitous passengers, with the maximum compulsory liability for a totality of claims, £20,000. The original Act also excluded spouses, children, grandchildren, parents, brothers, or sisters of the insured person from its framework,[162] and this provision was repealed, too, at the same time.[163] Provision was made for actions against a nominal defendant for both "hit and run" accidents [164] and accidents in which uninsured vehicles were involved.[165] The major differences from Victoria followed the South Australian Act. The method of effecting insurance was by presentation of a certificate of insurance from an "approved insurer"[166] to the registration authority.[167] Although nondisclosure, misrepresentation, breach of the Act or of contractual conditions could not abrogate an insurer's duty to indemnify,[168] there was a right of recovery over against the insured in such circumstances.[169] Approved insurers could also sue an unauthorized driver for damages they had paid out on his behalf[170] and apply to have a driving license cancelled.[171] Payments for emergency treatment and hospitalization

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[159] Act No. 32 of 1943.

[160] Motor Vehicle (Third Party Insurance) Act, 1943, section 6.

[161] Act No. 40 of 1944, section 4.

[162] Motor Vehicle (Third Party Insurance) Act, 1943, section 6(2)(b)(i).

[163] Act No. 40 of 1944, section 4. The repeal followed a similar repeal in South Australia.

[164] Motor Vehicle (Third Party Insurance) Act, 1943, section 7.

[165] *Ibid.*, section 8.

[166] See *ante*, footnote 105, for provisions relating to "approved insurers."

[167] Motor Vehicle (Third Party Insurance) Act, 1943, section 4(8) as amended by Act No. 40 of 1944, section 3. Western Australia differs from the other states inasmuch as licensing in rural areas is carried out by local government authorities under the provisions of the Traffic Act, 1919–1954, part II. The greater Perth area has numeral licences (e.g. 98–261) but each local district has prefix letters connoting the area and a number (e.g. MA-721, Mannum 721). In the metropolitan area the licensing authority is the Commissioner of Police, Motor Vehicle (Third Party Insurance) Act, 1943, section 14.

[168] Motor Vehicle (Third Party Insurance) Act, 1943, sections 7(4)(a)(b)(c).

[169] *Ibid.*, section 7(5).

[170] *Ibid.*, section 15.

[171] *Ibid.*, section 18.

were in the same form as in South Australia.[172] An innovation was made in the original Act by giving approved insurers the right to insist on a medical examination of a plaintiff, in the presence of his own medical adviser, but with no legal adviser in attendance.[173] In the following year, the legislature added a provision to the Act to provide that where a servant used his own vehicle in his employment, with his employer's acquiescence, the rights and duties of the servant's third party policy enured to the employer for any accident arising in the course of the servant's employment.[174]

Within several years of the passing of this Act a crisis developed in its operation when several of the smaller accident insurance companies and an insurance company formed by the Western Australian Royal Automobile Club withdrew from the scheme.[175] Local licensing authorities also experienced administrative difficulties[176] and demanded a new set-up. After a series of conferences between the Minister of Local Government and the interested parties, it was agreed to form a Motor Vehicle Insurance Trust to transact all compulsory liability insurance required by the Act. One of the abortive attempts to introduce compulsory insurance had proceeded on somewhat similar lines in 1941. A Select Committee appointed by the Legislative Assembly in 1940[177] to investigate the desirability of compulsory insurance, reported two months later[178] in favor of the creation of a "Compulsory Co-operative Pool," to which all compulsory insurance premiums would be paid by local licensing authorities and the Commissioner of Police, acting as its agents. The report gave no indication as to who should administer this arrangement. A bill was introduced in November, 1941,[179] to give effect to this recommendation by making the State Government Insurance authority the administering agency of the proposed pool. The exclusion of private insurers from the

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[172] *Ibid.*, sections 12, 13. For South Australia see *ante*.

[173] *Ibid.*, section 30. No action for damages could be commenced unless the plaintiff refused to have this examination with a "reasonable excuse," section 30(2).

[174] *Ibid.*, section 22(1).

[175] The information contained here on the causes leading to the creation of the Motor Vehicle Insurance Trust and its subsequent history and operation was supplied to the writer in interviews with the President of the Trust, Mr. C. F. Pearce and other officials of the Trust.

[176] A major problem was the difficulty of supplying certificates of insurance to local licensing authorities hundreds of miles from the major insurance offices in Perth. Weeks often elapsed before a motorist received back his certificate after posting his premium.

[177] 105 Western Australian Parliamentary Debates, 413.

[178] 1940 II Western Australian Parliamentary Papers, No. A 2.

[179] 108 Western Australian Parliamentary Debates, 2017.

scheme led to the rejection of the bill by the property franchise Legislative Council.[180]

The new scheme revived the pool technique, only this time private approved insurers were to take part in its formation and operation and share in its profits and losses. It was given legislative effect in 1948.[181] No changes were made in the extent of liability or any of the other basic features of the original enactment, but in the place of approved insurers the Trust was set up [182] to issue all third party policies under the Act[183] and pay all claims through a Motor Vehicle Insurance Fund.[184] The Trust consists of five members appointed by the Governor.[185] One member is the manager of the State Government Insurance Office, three are nominated by the Fire and Accident Insurance Underwriters Association of Western Australia, and one represents participating insurers who are not members of the Association.[186] All insurance premiums in Western Australia are now paid to the local licensing authority, with or before the payment of the automobile registration fee, and automobile licenses incorporate the policy of insurance embracing the compulsory coverage.[187] All premiums are paid into the Motor Vehicle Insurance Fund to meet the liabilities covered by the Act, and administrative expenses.[188] Approved insurers who participate in the scheme[189] are bound to make contributions, where necessary, to the fund[190] and must bear any losses[191] and have a right to share in profits.[192] Control of the Trust by the government was intensified in 1951 by inserting a provision that premium rates are subject to the control of the Minister.[193] In 1954 several changes were made by the Motor Vehicle (Third Party Insurance) Act of that year,[194] which made a number of alterations in the relationship between approved insurers and the Trust by directing the way in which surpluses and deficits should be apportioned among insurers[195] and, in particular,

[180] 108 Western Australian Parliamentary Debates, 2617.

[181] Act No. 31 of 1948.

[182] *Ibid.*, section 4; now section 3A of the principal Act.

[183] *Ibid.*, section 8; now section 6(1) of the principal Act.

[184] Act No. 31 of 1948, section 4; incorporated as section 3P of the principal Act.

[185] *Ibid.*, section 4; now section 3A(2).

[186] *Ibid.*

[187] *Ibid.*, section 6; now section 4(8). Local authorities were also made agents of the Trust; see section 3R (inserted by Act No. 31 of 1948, section 4.).

[188] *Ibid.*, section 4; now section 3B(2).

[189] *Ibid.*, section 5; now section 3L.

[190] *Ibid.*, section 4; now section 3N.

[191] *Ibid.*, now section 3P(6).

[192] *Ibid.*, now section 3P(5).

[193] No. 40 of 1951, section 7; now section 3R(5).

[194] Act No. 36 of 1954.

[195] *Ibid.*, section 2, acting as amendment to section 3P of principal Act.

limiting the dispersal of surpluses to participating insurers to a maximum of 5% of premium incomes for any one year.[196] Where there is a surplus above this it is to be paid into a General Reserve Account[197] with a view to reducing premiums[198] and bearing any future losses which might result from the operation of the scheme.[199] With the formation of the Trust, the need for actions against a nominal defendant was removed, and all actions for "hit and run" accidents[200] or where an uninsured motorist is involved in an accident[201] are now brought directly against the Trust.

The basic reasons for the formation of the Trust were to cut administrative expenses, allow more of the premium incomes to be available for claims, keep premiums down, and minimize the delays caused to local registration authorities in registering vehicles since the introduction of compulsory insurance. These aims have been largely fulfilled. The issue of policies as part of the automobile license has proved a time and money saving proposition. Administrative costs have also been cut drastically. A small staff[202] covers all aspects of the compulsory insurance business, including the settlement of many of the claims. Trust officials estimate that, before the Trust co-ordinated compulsory insurance business, individual Western Australian insurers spent at least 20% of their third party premium incomes on administrative expenses, 5% on commission, leaving at the most 75% of this income to meet claims. In 1953–4 the Trust's management expenses only amounted to 2.85% of its premium income[203] and 0.87% was spent on commission and agent's charges. The Trust estimates that it can operate with reasonable premiums and have at least 90% of each year's premium income available for claims, set aside 5% for meeting taxation, commission and agents' charges and administrative charges, still leaving a surplus for division among participating approved insurers. To date the Trust has broken even on its business, and Western Australian premiums are much lower than those in the other states.

Although the introduction of the "pool" technique at a legislative level did no more than alter the administrative set up of the compulsory in-

[196] Incorporated as section 3P (5)(a)(IV).

[197] *Ibid.*, section 3P(5)(a)(V).

[198] *Ibid.*, section 3P(7)(d).

[199] *Ibid.*, section 3P(7)(e).

[200] *Ibid.*, section 7(3).

[201] *Ibid.*, section 8(1).

[202] A manager, assistant manager, claims clerk, three other clerks who work in the claims department and also deal with statements and country insurance business, an accountant, four investigators, four typists, and seven other general clerks make up the entire working staff of the Trust.

[203] In that period, the Trust's premium income was £510,680; management expenses were £14,572; commission and agents' charges amounted to £4,448. See Statistical Register of Western Australia, 1953–54, Parts II and III, Public Finance and Accumulation, page 31.

surance scheme, the results of the practical day to day operation of the Trust has led to significant changes in the orientation of Western Australian motor accident law. The creation of a single organization vested with the responsibility of dealing with all automobile accident claims for personal injuries or death has made deep inroads on the use of legal machinery to deal with such claims. In the process, this has come to play an increasingly smaller part.

Today, on an average at least 95% of motor car claims of this nature are settled out of court, in the vast majority of these cases independently of legal assistance in the confines of the Trust's offices. The Trust's four investigators gather all the available evidence on all major accidents reported to the Police and Ambulance Service. In addition, all motorists who are involved in accidents which come to the notice of the Trust are immediately circularized by the Trust, which points out the motorists' duty under the Act[204] to report details of the occurrence to the Trust. With this communication, the Trust forwards an "Accident Report Form" in which motorists are required to give full details of the accident. If any claim follows, the Trust has all of the available evidence from both sides and is in an excellent position to see the strength and weaknesses of the potential litigants. The Trust encourages settlement through its own officers and Trust officials claim that most payments are made by rule of thumb. Passengers in a vehicle are said almost invariably to receive payment to cover both special and general damages. The usual practice in dealing with pedestrians is to hold them at least one third liable for the accident, and the Trust gives them two thirds of the amount which it considers to be fair and just compensation in the circumstances. Only in exceptional cases might the Trust, on its review of the evidence, hold the pedestrian to be 50% liable for an accident. Where there are small claims and the Trust considers a person has suffered real harm, it often settles for a sum it considers to be reasonable to cover special damages together with a small amount for general damages, without regard to fault. In 1955, Trust officials estimate that about 2,400 claims were entered in its files. About one third came to nothing and were not pressed by the claimants. Of the rest, 1,500 were settled, with payments made in each case, and approximately 100 were subject of writs issued out of the Supreme Court. Although the figures showing the number which actually went to trial are not yet available, some idea of the number which actually would reach the hearing stage can be gathered from the fact that 45 motor

[204] Motor Vehicle (Third Party Insurance) Act, 1943, as amended by No. 31 of 1948, section 12.

claims cases proceeded to judgment in the Western Australian Supreme Court in 1955.

The results of the Trust's operations are bringing Western Australian motor accident law increasingly closer to becoming similar to workers' compensation legislation. What has been barred from entering at the front door by the traditional emphasis on fault is creeping in the back. This process has been assisted by the abolition of jury trials in motor claims cases in that State.[205] The Trust has been able to list set payments beside certain classes of injury by assessing the general approach of the judiciary to similar cases, and then making a settlement on this basis.

The Western Australian enactments would seem to have evolved the most efficient and financially successful techniques for the operation of the Australasian type of compulsory insurance scheme. Insurers in the other States have been reluctant to press for legislatively organized pool systems, believing that the Western Australian type of organization is just a short step from complete governmental control of automobile insurance. However, in all of the other States, and in Victoria and New South Wales in particular, insurers are facing serious financial difficulties in relation to their compulsory insurance business and may soon be forced to accept some changes.

Victoria and New South Wales are the only Australian states to retain jury trials in this class of action,[206] and insurers there are constantly urging as a palliative that jury trials should be abolished. Their criticisms are twofold. They charge that, since the introduction of compulsory insurance, juries have shown an ever-increasing propensity to find for plaintiffs and have increased damages awards out of all proportion to the decrease in the value of money. As a result insurers have developed the practice of going out of their way to settle as many cases as possible, as they believe they have little chance of success before juries. It is a most exceptional plaintiff in Victoria or New South Wales who does not mark his writ for trial by judge and jury, and, after speaking with a number of leading insurers, the writer is satisfied that the number of settlements is

[205] Motor Vehicle (Third Party Insurance) Act, 1943, section 12.

[206] The provisions abolishing jury trials are:

Tasmania: Road Traffic Act, 1925, section 12.

Queensland: Motor Vehicles Insurance Acts, 1936–1945, section 12.

In South Australia, section 70i of the Road Traffic Act abolishes jury trials only in actions against "the owner or driver" and does not on its face extend to actions against a Nominal Defendant. However, Parsons, "Death and Injury on the Roads," 3 University of Western Australia Annual Law Review (1955) 201, note 1 at page 257, states that "in any case the writer is informed, juries have not been used in civil cases in South Australia for more than 25 years; they were virtually abolished by the Juries Act 1937."

well in excess of 93%. The position in relation to nominal defendant claims is even worse.[207] Without corroborative evidence, many successful claims are being made against nominal defendants where dazzling headlights or speeding cars are alleged to have interfered with a driver's judgment and the identity of the vehicle is unknown. As a result, the number of nominal defendant claims has grown astronomically in the jury states whilst in the nonjury states these claims are only of minor significance. In South Australia for the three years preceding January 1956, there were 188 reported "hit and run" accidents, 89 claims were actually made against the nominal defendant, and 32 of these claims were successful.[208] The total amount paid out was £5,087. In the latest figures available from Western Australia[209] four claims for "hit and run" accidents were satisfied by the Motor Vehicle Insurance Trust from July 1, 1955, to December 31, 1955. Total payments by the Trust involved £1,766. There were then 21 claims outstanding with an estimated outstanding liability of £3,965. The contrasting figures in Victoria are somewhat startling.[210] From 1944–5 to 1948–9 the number of claims more than doubled from 223 to 475. There was a small drop in 1949–50, but since then there have been rapid increases. In the period 1952–3, the latest period for which figures are available, there was a total of 691 claims,[211] damages payments and expenses amounted to more than £125,000, with an estimated outstanding liability of £269,000. A comparison between the number of actual accidents reported and nominal defendant type claims made in Victoria and Western Australia in 1953 underlines the disparity between these two States. The 691 notified nominal claims in Victoria were 5.246% of the 13,173 accidents which resulted in personal injuries or death in the state during the year.[212] In Western Australia, the 18 cases in which actual steps were taken to get damages amounted to only .371% of the 4,856 accidents which resulted in personal injuries or death.

[207] For a general summation of the position see: Castles, "Legislative Reform of the Nominal Defendant Provisions of the Motor Car Act," 7 Res Judicatae (1955) 153.

[208] There are no published statistics on the number of nominal defendant claims in South Australia. These were supplied from the records of the South Australian insurers.

[209] Again these statistics are not published. They were gathered especially for the writer by officials of the Western Australian Motor Vehicle Insurance Trust.

[210] These figures are approximations only. They were made available to the writer by the Victorial Nominal Defendant Committee.

[211] Unfortunately, these figures do not differentiate between claims resulting from "hit and run" accidents and those in which recovery is sought against the nominal defendant when an uninsured motorist has failed to meet a judgment. However, the number of latter claims is remarkably small, probably not in excess of 15.

[212] Accident statistics from Australian Road Safety Council Report, 1954, Statistical Section, page S 2.

Up to the introduction of compulsory insurance, jury assessment of damages was reasonably satisfactory in motor claims cases. But since its introduction the position has steadily deteriorated. The propensity of juries to fasten their attention on the question of ultimate responsibility has resulted in damages far in excess of the standards set in the years before the second world war. Appellate courts have not deviated from their unwillingness to order new trials on the question of damages,[213] unless they are satisfied that the verdict is against the weight of evidence and so unreasonable that it is out of all proportion to the circumstances of the case.[214] Nor have they failed to take into account rapid changes in the value of Australian currency.[215] Despite this reluctance by appellate courts to entertain appeals against jury damages assessments and their willingness to take into account changing money values, jury awards have been increasingly appealed against, particularly in New South Wales. At times the New South Wales Supreme Court has found itself faced with an almost impossible situation. This was typified in the impasse which developed during 1952–4 in the Full Court's dealings with the case of *Commissioner of Road Transport* v. *Cullinan*. At the trial of the action in February 1952, the jury found against the Commissioner and awarded Cullinan £17,500, consisting of £15,000 for general damages and £2,500 for specials. The Commissioner appealed and the Full Court of New South Wales unanimously agreed to order a new trial on the question of damages.[216] Chief Justice Street found that there could be "no real justification" for the awards and criticised the jurors for setting "a new and extravagant standard not warranted by what has prevailed in the past."[217] Despite this and other attacks on the award,[218] at the retrial in November 1953 a second jury was no less loath than the first to show the same favor towards the plaintiff, and their verdict was for £18,000. Again the Full Court was called upon to adjudicate on the matter and had no alternative but unanimously to order a second retrial.[219]

The Full Court in the second Cullinan case did not clearly articulate why juries had become untrustworthy as damages assessors in motor

[213] James v. Colahan, [1951] Argus. L. R. 90.

[214] Pamment v. Pawelski, [1949] 79 C.L.R. 406, 409, per Latham C. J., and McTiernan J.; Coates v. Carter, [1951] 82 C.L.R. 537; Hateley v Allport, [1954] 54 S.R. (N.S.W.) 197; Lewis v. Christie, [1955] 55 S.R.(N.S.W.), 425; Anderson v. Howlett and Stewart, [1955] 55 S.R. (N.S.W.) 203; Parry and Pedlar v. Fisher, [1936] V.L.R. 58.

[215] Hateley v. Allport, [1954] 54 S.R.(N.S.W.), 17 at 22–23; Commissioner of Transport v. Cullinan, [1952] 52 S.R.(N.S.W.), 197, 202 per Street C.J.; 200 per Roper C.J. in Equity.

[216] *Ibid.*, 199.

[217] *Ibid.*, 203.

[218] *Ibid.*, 205–6.

[219] 54 S.R.(N.S.W.) 197. It is believed the case was finally settled out of court.

claims cases. Their Honours had no need to, for six months before in *Hateley* v. *Allport*,[220] their Chief Justice and two of his brethren gave full vent to their views on their experience with juries operating within the compulsory insurance field in that state.[221] Their Honours stated that the ever-mounting damages awards by juries were tending to make a mockery of the traditional legal processes and "we are face to face with the fact that there is at the present time an increasing number of cases in which plaintiffs, as the result of awards of extravagant damages, are profiting from their own misfortunes."[222] Their Honours were fully aware of the changes in the value of money that had taken place since the introduction of compulsory automobile insurance, and their evaluation of damages awards in relation to the changing cost of living provides strong confirmation of the effect compulsory insurance has had on jury awards. The court stated:

"Speaking from experience it can be said that up to the year 1940 verdicts for £5,000 or more for personal injuries were a rarity in this state, and we cannot recall any case in which a verdict for the sum of £10,000 or more was given. But recently we have been called upon to consider verdicts of upwards of £30,000, rising even as high as £45,000 for personal injuries analogous to the case now under review. Verdicts of £10,000 and upwards have been given quite frequently, and twice in the past year juries who dealt with the same facts in the same action awarded sums in excess of £17,000 for the loss of a leg. It can safely be said that the size of verdicts returned by juries in similar circumstances has increased fivefold in the last ten years. It cannot be suggested that the diminution in the purchasing power of money can properly account for these increases. On the Commonwealth Statistician's figures based on the Retail Price Index Numbers for Sydney the approximate position is that it cost £2 in 1953 to purchase what could have been obtained for £1 in 1943. If this be accepted as a guide, then present day verdicts might reasonably be expected to be double the amount of similar verdicts in 1943. But the steep increase in the size of verdicts has taken place in the last three years, and the purchasing power of the pound has not fallen in the same ratio in that period."[223]

To date the position has not been quite so bad in Victoria. Nevertheless, there are judicial pronouncements which indicate that the judiciary is far from satisfied in the every upward trend of damages awards.[224]

[220] 54 S.R.(N.S.W.) 17.
[221] *Ibid.*, 21–22.
[222] 54 S.R.(N.S.W.) 17.
[223] *Ibid.*, 22.
[224] Kranz v. Riley Dodds, [1954] Argus L.R. 617, in particular Lowe J. at 620; Parry and Pedlar v. Fisher [1956] V.L.R. 58, in particular Hudson J. at 63.

Awards above £10,000 are quite common. In contrast, in the nonjury state of Western Australia, the highest award given by the Supreme Court in 1955 was for £5,500 general damages with specials amounting to £1,837.[225] The highest award made in the same period in South Australia was for general damages of £6,000.[226]

The case against juries in motor claims cases rests not only on these assertions. Two of the greatest problems in the administration of justice in the present era have been to dispose of litigation in as short a time as possible and to keep down costs. Motor accident cases form the largest segment of Australian civil court lists, and the retention of juries in this field is greatly aggravating these problems. There have been long delays before jury trials could be set down for hearing in both Victoria and New South Wales. This has been due in no small way to plaintiffs insisting on jury trials in the hope that doubtful cases will receive sympathetic consideration both as to fault finding and damages awards. As an instance of the backlog of claims, the largest compulsory insurance office in New South Wales, the Government Insurance Office, had outstanding claims totalling £6,583,000 on its books on June 30, 1955.[227] Because of the unsatisfactory nature of jury awards, long and expensive appellate proceedings have frequently resulted, bringing added hardship in the form of long waits for final decisions and greatly added costs.

The abolition of juries may achieve a more stable position in Victoria and New South Wales, but ultimately insurers may well be forced to accept an arrangement similar to that in Western Australia. Even the Western Australian solution cannot be regarded as the last word on the form Australasian automobile insurance legislation will take. One Western Australian lawyer has taken up the cause of introducing a compensation scheme in that state, similar to workers' compensation, and has already prepared the framework for such an enactment.[228] His work could well be the foundation for further important and startling changes in the Australasian approach to this branch of the law.

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[225] Unreported. Filed in Western Australian Supreme Court as Case H 24/1955.

[226] Unreported. Issued in mimeographed form by The Law Society of South Australia in volume 14 of an unofficial reporter series at 127.

[227] Sydney, Sunday "Sun-Herald", October 23, 1955, 19.

[228] Parsons, "Death and Injury on the Roads," 3 University of Western Australia Annual Law Review (1955) 201, 271 ff.

S. A. BAYITCH

Transfer of Business

A Study in Comparative Law

THERE IS A legal maxim of long standing well stated by Paulus[1] that monetary claims create no "interests in a thing but only compel the other party to give us something . . ." in payment. Developments of the last century have introduced significant changes in this rule, particularly in the field of commercial transactions. The main current of change is best evidenced by the fact that in an increasing number of situations debtor's assets, regardless of a subsequent change in ownership, or the transferee thereof are made liable for the debts of the prior owner.

This study is devoted to a comparative analysis of these changes in cases of transfers of businesses or business assets. For obvious reasons, those situations where any specific security transactions have been constituted in favor of the creditor as well as where corporate entities are transferred, remain beyond the scope of this article.

THE NATURE OF THE PROBLEM

As evidenced by the development of the law of contracts from the *nexum* to the abolition of imprisonment for debt, primitive law continued the rule that the debtor remains personally liable. This principle has two immediate consequences: the one, that the principal object of liability is the person of the debtor; and the other, that the assets available to creditors are those owned by the debtor at the time when they seek payment. At this stage of legal development, the debtor's assets remain untainted by the owner's indebtedness. Only more advanced legal systems provide a remedy against alienations made *in fraudem creditorum* as, for example, the *actio Pauliana* and the Statute of Elizabeth (1571).

Two factors, among others, contributed to the shift from a personal to that of a more asset-centered liability. One of them is the vanishing value of personal liability. The other is the growing reliance, in commercial transactions, by the creditor on the debtor's assets. Yet the traditional in personam approach has not been totally abandoned. Still

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[1] D. 44.7.3

it remains the gateway to the debtor's assets, even though its utility has recently been reinforced by the use of new devices. One such innovation is the right given to creditors to avoid any abnormal change in the debtor's economic *status quo*. The idea of tying in creditor's claims with debtor's assets, short of their becoming liens, may be intensified in various ways. The most stringent rule makes the debts run with the assets and, by so doing, adds, in cases of transfers of assets, a new debtor in the person of the transferee. He becomes bound simply by acquiring the assets.

This process of depersonalization of debts is matched by a parallel development with regard to credits. They too may be attached to assets rather than exclusively to the person of the creditor. Thus debts as well as credits can pass with assets when a sufficient connection is found to justify such a result. Finally, these new concepts may embrace both sides of a contractual relationship. When this occurs, the assets continue to benefit by or be subservient to, the contract regardless of change in the persons of the contracting parties.

In most of these situations it is apparent that the traditional law of contracts has undergone important changes. As a consequence, debts as well as credits may pass from one person to another without complying with the requirements of novation and assignment. Most although not all of these innovation have occurred in the area of commercial transactions. The strongest expression of change has been in those situations where the assets transferred had been organized as a unit. The typical example of such organized collectivity of assets is an enterprise[2] as a whole or any part thereof such as shares or interests therein, or specific chattels belonging thereto.

Legislative Background

An early solution of the underlying problem was reached in Roman law.[3] The universal succession *mortis causa* and, in a few instances, transfers *inter vivos* made the *heres* or the transferee of the particular patrimony

[2] Casanova, Le imprese commerciali (1955); Despax, L'entreprise et le droit (1957); Ferrara, Teoria jurídica de la hacienda mercantil (1950); Goldschmidt, "La notion juridique du fonds de commerce," 7 Cahiers de Législation et de Bibliographie Juridique de l'Amérique Latine (1952) 9, (hereinafter cited Cahiers); Gonzales Polo, La empresa y la hacienda mercantil (1955); Jacobi, Betrieb und Unternehmen als Rechtsbegriffe (1926); Satanowski, "Nature juridique de l'entreprise et du fond de commerce," 9 Revue Internationale de Droit Comparé (1956) 726; Schapiro, Das Unternehmen und seine Kennzeichen (1935); Supervielle, El establecimiento comercial (1953).

[3] Birkmeyer, Über das Vermögen im juristischen Sinne; römischrechtliche Quellenstudien (1879).

liable for debts inherent in such estates.[4] For many a century liabilities could pass with assets only by way of inheritance until the commercial enterprise was recognized as a new juridical entity. Quite early French courts and some municipal statutes accepted the unit of the *fonds de boutique* (meaning stock in trade) which later developed into the *fonds de commerce*.[5]

Supported by Germanic ideas of multiple estates and revisionist tendencies among pandectists,[6] new attitudes evolved. The revised German Commercial Code of 1897[7] was the first modern legislative attempt to introduce the idea of depersonalized obligations. Following traditions established by customary law, the Code developed the idea primarily as a means of strengthening the reliability of a *Firma*.[8] Thus limiting its provisions to include only transfers of business to be continued under the same *Firma*, the Code imposes effects of the transfers equally on the debits and credits. In regard to liabilities, the Code adopted the rule that, by operation of law, debts pass to the transferee who becomes jointly liable with the transferer. Claims connected with the business, it may also be stated, pass to the transferee as well. These provisions being dispositive in nature, their operative effect may be modified or excluded by agreement of the parties. Such contractual variation of the law is valid against creditors only when it has been inscribed in the commercial register and published, or if the parties have notified creditors to this effect. Where a business is transferred without the *Firma*, the transfer will not automatically affect debits and credits. Should the transferee give notice of the transfer or should the substitution take place in accordance with the general law of contracts as contained in the Civil Code, then a similar result may be reached.

The Civil Code of 1898[9] expanded some of these rules to include not

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[4] E. g. *emptio bonorum* (Gaius 3, 81) where debts ran with the *bona* actionable by *actiones utiles*. Similarly in *adrogatio* (Gaius 3, 84) where "*omnes eius res incorporales et corporales quaeque ei debitae sunt patri adoptivo . . . adquiruntur.*" On the contrary, liabilities, i.e., "*quod debuit . . non transit*" except *hereditarium ius alienum*, liabilities owed in the capacity of heirs. Finally, *cessio bonorum*, the voluntary assignment of one's patrimony to his creditors (D. 42.3), still with us.

[5] Cohen, *op. cit.* n. 14, 1.

[6] Bekker, System des heutigen Pandektenrechts (1886) 137.

[7] Art. 25. Gessler (a.o.), Handelsgesetzbuch . . . 169 (1950). Similar provisions are adopted in the Commercial Code of Japan, Art. 26 (1899).

[8] *Firma* being the name under which a business is conducted (Art. 17); cannot be alienated without the business (Art. 23).

[9] Art. 419; *cf.* 2 Motive zum Entwurfe eines bürgerlichen Gesetzbuches für das Deutsche Reich (1888) 151.

only transfers of *Unternehmen* but also of *Vermögen*. On the question of the passing of debts, the Code introduced limitations upon the liability of the transferee reducing it to one limited to the assets transferred (*cum viribus*) increased by claims arising out of the underlying transaction. In addition, the Code made these rules imperative in nature, i.e. not amenable to modification by private agreement.

The Swiss Code of Obligations of 1911[10] only followed the trend thus established. In cases of the transfer of a *Vermögen* or an *Unternehmen* with their debts and credits, the transferee became jointly liable with the former owner-debtor, provided notice of the transfer was given to creditors and made public in papers.

In 1916 a carefully redrafted version of these provisions with two major changes was made a part of the Austrian General Civil Code of 1811.[11] One of the changes limited the liability of the transferee to debts that he "knew or should have known";[12] this rule is reversed in cases where the transferee is a near relative who is liable unless he proves that he "did not know nor should have known" of the debts. The other change limits the passing of debts to those having connection with the patrimony or enterprise transferred. These rules then migrated to Greece where they became part of the Civil Code of 1940.[13]

Through these developments the civil law now finds the enterprise, alongside the patrimony, as a vehicle for the automatic passing of debts outside of the traditional law of contracts. While this was achieved in countries representative of German legal thought by means of *Vermögen*, the *Firma*, and the *Unternehmen*, the French legislation followed its own traditions embodied in the *fonds de commerce*. In 1909 France enacted the most elaborate piece of legislation in this field.[14] The statute mainly relies on making the transfer public, giving in this way creditors the opportunity to protect their interests. Moreover, creditors may

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[10] Art. 181; Guhl, Das schweizerische Obligationenrecht (1956) 227. The same provision appears in the Civil Code of China, Art. 305 (1930) and in the *Code des Obligations et Contrats* in force in Tangier (Art. 334).

[11] Art. 1409; Wolff in 6 Klang, Kommentar zum österreichischen allgemeinen Bürgerlichen Gesetzbuch (1952) 353. Adopted also in the Czechoslovak (1924) and Yugoslav (1934) drafts for civil codes.

[12] Previously adopted in the Hungarian 1908 amendment to the Commercial Code (Art. 20).

[13] Art. 479.

[14] Loi relative à la vente et au nantissement des fonds de commerce, March 17, 1909. Cohen, Traité théorique et pratique des fonds de commerce (1948). In the Western Hemisphere, the law is in force in Martinique (1927) and Guadeloupe (1932). For recently planned reforms, see 4 Travaux de la Commission de réforme du Code de Commerce et du droit des sociétés (1953) 456.

oppose the transfer and demand that the purchase price be deposited, or even that a public auction be held.[15]

In recent decades the concept of the commercial and industrial enterprise as an autonomous juridical entity has achieved unexpected prominence through the corporativist ideologies of the National-Socialist and Fascist movements. The German Act of 1934 for the Regulation of National Work visualized the single *Unternehmen* under its *Führer*, i.e. the owner, as the economic, social, and political nucleus of the New Order.[16] This enactment did not survive 1945, but its Fascist counterpart, the provisions regarding the *azienda*, incorporated into the Civil Code of 1942,[17] weathered the purge of 1944 to remain the model for some of the Latin-American countries.

Turning to the Western Hemisphere, it is to be noted that the first attempts in this field of legislation occurred in this country in the form of bulk sales laws.[18] These acts, though differing in many details, have one thing in common: they are designed to make available to creditors any assets withdrawn from the debtor's business by unusual dealings. This has been achieved by utilizing the remedy of avoidance as applicable to fraudulent conveyances, in situations where violations of objective standards of open dealing as set up by these laws have occurred. Beginning in Louisiana in 1894,[19] this type of legislation, though not one of the uniform laws, spread into the statute books of every state of the Union and finally into the Uniform Commercial Code.[20] The same type of law has been adopted in all of the provinces of Canada,[21] that enacted in Newfoundland in 1955 being the most recent and elaborate.[22]

Cuba in 1900 was the first country outside this common-law block to adopt legislation of this kind. At this time The Island happened to be under the United States Military Government which enacted Order

[15] In Europe, the act was closely followed by the Polish decree concerning commercial registers (1919), 1 Rivista di Diritto Comerciale (1921) 262.

[16] Siebert, Das Arbeitsverhältnis in der Ordnung der nationalen Arbeit (1935).

[17] Mossa, L'impresa nell'ordine corporativo (1935); Historia de derecho mercantil en los siglos XIX y XX, (1948) 130, and Trattato del nuovo diritto commerciale secondo il Codice Civile de 1942, (1942) 163, 335; also Santoro-Passarelli, "L'impresa nel sistema del diritto civile," 1 Rivista del Diritto Commerciale (1942) 376.

[18] Billig, "Bulk Sales Laws: a Study in Economic Adjustment," 77 Univ. of Pa. L. Rev. (1928) 72; Weintraub and Levin, "Bulk Sales Law and Adequate Protection of Creditors," 65 Harv.L.Rev. (1952) 418. Also 33 Harv.L.Rev. (1920) 717.

[19] Louisiana R.S. 9: 2961–2968.

[20] Uniform Commercial Code (rev. ed. 1957). Broeker, "Articles 2 and 6: Sales and Bulk Transfers," 15 Univ. of Pitts. L.Rev. (1954) 541; Miller, "Article 6—Order out of Chaos: a Bulk Transfers Article Emerges," Wis. L.Rev. (1952) 312.

[21] Including Quebec, Civil Code, Art. 1569 (a) through (e) (1910, 1914).

[22] Statutes of Newfoundland 1955, No. 26.

No. 400.[23] Having inherited the commercial register from Spain, it was only natural for Cuba to build its system of controls around the register. Not only must transfers of commercial and industrial enterprises be properly recorded there, but also, following patterns developed in the United States, a list of creditors must be attached to the instrument. But Cuba did not adopt the sanction of voidability; rather it followed the European idea of debts running with the enterprise.

One year later, in 1901, Costa Rica enacted a Decree regarding the sale and transfer of commercial enterprises.[24] It imposes a delay for the payment of the price until after publication of the transfer and grants creditors the right to voice oppositition against the transfer as well as to put in a higher bid, features foreshadowing the 1909 French act. The country to follow was Uruguay which in 1904[25] adopted an act requiring publicity and making debts run with the enterprise, both in case of compliance as well as noncompliance. With only slight modifications this act was adopted in Peru in 1916.[26]

Meanwhile France enacted the elaborate statute of 1909. It can not surprise that this act was instrumental in shaping the next Latin-American enactment, the Argentine law concerning the transfer of commercial and industrial enterprises (1934),[27] the most elaborate statute of its kind in Latin America. While French ideas retained some influence through this version, the Italian Civil Code of 1942 gained prestige. The impact

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[23] As amended by regulations concerning commercial register (1932); texts in 1 Nuñez y Nuñez, Código de comercio concordato con la legislación . . . 122 (1938).

[24] Decreto no. 23 referente a la venta o trasmisión de establecimientos mercantiles (1901), in 1 Leyes y reglamentos usuales 525 (1953). For a survey, Scolni, "L'aliénation de fonds de commerce en Amérique Latine," 9 Cahiers (1952) 26.

[25] Law of September 22, 1904, in Legislación del Uruguay vigente 1825–1928, 1186 (1929). Sarachaga, "Observaciones sobre el proyecto de reforma del art. 229 del Código de Comercio," 10 Revista de Derecho, Jurisprudencia y Administración (1904) 321; Supervielle, El establecimiento comercial (1953) 330.

[26] Law no. 2.259 (1916) in 11 Anuario de la Legislación Peruana (ed. of.) (1917) 22.

[27] Ley no. 11.867, transmisión de establecimientos comerciales y industriales, in 2 Fernandez, Código de comercio comentado (1945) 95. Camara, Transmisión de establecimientos comerciales e industriales (1947); Carranza, Ley sobre compraventa de casas de comercio y establecimientos industriales (1947); 2 Garo, Tratado de las compra-ventas comerciales y marítimas (1945) 131, also in his 1 Derecho comercial: compraventas (1956) 463, 512; 1 Malagarriga, Tratado elemental de derecho comercial (1951) 896; 1 Rivarola, Tratado de derecho comercial argentino (1938) 191; Scolni, Transmisión de establecimientos comerciales y mercantiles (1946). Recently, Giron, La transmisión de los establecimientos comerciales e industriales, 60 Revista del Notariado (1956) 660.

The 1936 draft of a civil code adopted German-Austrian patterns, Reforma del código civil (1936) 413. For recent trends, see 1 Sera Justicia, no. 185 and 196 (1956).

For Brazil, see Azulay, La conception Brasilienne du fonds de commerce, 9 Cahiers (1952) 43.

of its thinking is apparent throughout the Honduran Commercial Code of 1952,[28] particularly in the provisions concerning the *empresa comercial*. In the 1954 Mexican Draft for a Commercial Code, the impact both of Italian doctrine and the Code is overwhelming.[29] On the contrary, the most recent enactment in the field, the 1955 Law of partial reform of the Commercial Code of Venezuela[30] is but a simplified version of the Argentine act, except the running-with-the-assets device introduced as sanction.

Comparative Analysis

The basic situation is simple enough. It involves the transferor or debtor about to alienate or having already alienated the assets; the creditor who, in situations discussed here, has no secured interest in the assets; and the transferee to whom the assets are to be or have already been transferred. This triangle revolves around the assets, the subject matter of the transfer.

Fundamentally, only two methods have been developed to cope with the situation. The first, the precautionary, concentrates on preventing the *malum*, i.e. the disappearance of debtor's assets as consequence of secret or unusual dealings before it happens. To bring such transfers into the open, an intricate system of announcements is imposed upon parties to the transfer, with which they are to comply or face sanctions. The other method may well be termed the automatic method. Dispensing with precautionary measures it simply makes debts run with the enterprise or assets transferred.

(1) *Subject-matter of the transfer*. It has already been indicated that only transfers of specific kinds of assets will bring the transfer within

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[28] Art. 644 through 651 Código de comercio (ed. of.), 1950. The break with tradition is emphasized in the *exposición de motivos* (*ibid.* 41): "La consideración de la empresa como centro del derecho mercantil y de las actividades del comercio exige que, con ruptura de viejos principios, la transmisión de la empresa signifique la de las deudas y derechos que se refieren a la misma, salvo, naturalmente, pactos especiales; quien transmite una empresa la transmite con sus derechos y sus obligaciónes, y el adquirente la recibe con estas obligaciónes y con aquellos derechos."

[29] Proyecto de código de comercio Mexicano (1954) Art. 616–625. Barrera Graf, "El proyecto del código de comercio Mexicano," 4 Revista de la Facultad de Derecho de Mexico, no. 19, (1954) 28; also, La empresa en el nuevo derecho mercantil italiano, su influencia en el derecho mexicano, 7 Boletin del Instituto de Derecho Comparado de Mexico, no. 19, (1954) 85; Cervantes Ahumada, "Le fonds de commerce dans la législation Méxicaine" 9 Cahiers (1952) 51; Mantilla Molina, Derecho mercantil (1956) 93; 1 Rodriguez, Curso de derecho mercantil (1952) 411.

[30] Ley de reforma parcial del código de comercio, Oct. 17, 1955, Gac. Off. no. 472 (extr). De Sola, "Les fonds de commerce en droit vénézuélien" 9 Cahiers (1952) 57; Goldschmidt, La reforma parcial del Código de Comercio de 1955 (1955); Pierce, "Latin American Commercial Law: the 1955 Reform in Venezuela," 10 Miami L.Q. (1956) 507.

the reach of the provisions discussed here. In a general way, it may be stated that these assets are an enterprise or other commercial assets. Legal systems of the civil-law group, i.e. European as well as Latin-American, demand the transfer of an enterprise.[31]

In contrast, legal systems of the bulk sales type, mainly this country and Canada, concentrate on transfers of specific assets "in bulk or in part or the whole of a stock of merchandise or of fixtures, or merchandise" sold "out of the usual or ordinary course of business."[32] The recent Newfoundland act[33] operates mainly with the stock, but stock is expanded to include not only goods and merchandise but also accounts receivable, choses in action, franchises, and goodwill. Only a few bulk sales acts include, at least expressly, the transfer of a whole business.[34]

The difference in approach is not only apparent but fundamental. In view of this, it is not surprising to find that the bulk sales acts encounter difficulties the more the subject-matter of the transfer moves from specific chattels toward the whole enterprise.[35] Conversely, civil-law countries appear progressively apprehensive when dealing with transfers of specific assets.[36]

(2) *Underlying transaction.* To come within the purview of this type of legislation, the transfer, in addition to dealing with a particular sub-

[31] Argentina defines the commercial enterprise or *fondo de comercio* as including "fixtures, stock in trade, commercial name and designation, goodwill, lease, patents, trade-marks, industrial models, honors and all other privileges derived from commercial, industrial or artistic property" (Art. 1). The terse Italian definition (Civil Code, Art. 2555) that *azienda* means the "complex of goods organized by the enterpreneur for the conduct of the enterprise" is expanded in the Honduran Code (Art. 644) to state than an *empresa mercantil* is a "co-ordinated complex of labor and corporeal and incorporeal factors, intended to offer to the public goods and services, for gain and in a systematic way." With only slight changes the same definition appears in the Mexican draft (Art. 616). France operates with her special narrower notion of *fonds de commerce*, while other countries avoid definitions and leave it to the courts to interpret the term.

[32] Billig and Smith, "Bulk Sales Law: a Study in Statutory Interpretation," 38 W.Va.L.Q. 309 (1932), and "Bulk Sales Laws: Transactions Covered by These Statutes," 39 W. Va.L.Q. 323 (1933); Miller, "Bulk Sales Laws: Business Included," Wash. Univ. L.Q. (1954) 1; and "Bulk Sales Laws: Meaning to be Attached to the Quantitative and Qualitative Requirement Phrases," *ibid.* 283. See also n. 18.

[33] Art. 2.

[34] Florida Stat. 726.05 (1955); Oregon Rev. Stat. 64.101 (1930); Washington Rev. Code 63.08 (1951).

[35] These statutes are considered penal and in derogation of common law, therefore to be strictly construed, State Bank of Viroqua v. Jackson, 53 N.W. 2d 433 (1952); *cf.* Sapphire Corp. v. American Mercury Magazine, 138 N.Y.S. 2d 286 (1955). For additional documentation, see n. 32.

[36] French courts require the transfer of "l'ensemble des éléments qui constituent le fonds de commerce," Benier v. Lieusère, Cass. 1938, Sirey 1938.1.390, and Administration de Postes, etc. v. Caminade, Cass. 1944, Sirey 1944.1.83.

ject matter, must have been effectuated by a specified type of legal transaction.

There can be little doubt that, with a few exceptions,[37] only transfers *inter vivos* are covered. Most countries accept any type of transfer, from one based upon a contract (Germany, Greece), sale or cession (France), to a colorless reference to the very effect of the transaction, the transfer (Switzerland, Austria). Bulk sales acts apply, of course, primarily to transfers brought about by sales.[38]

At this point, it seems appropriate to indicate another problem involved, namely, that of the relationship between the validity of the underlying transaction and the requirements imposed upon transfers. Generally speaking, it may be stated that even in situations where parties do not comply with special requirements, e.g. announcements, notices, etc., still the underlying transaction will stand. Where the transaction is voidable, as, for example, under the bulk sales acts, noncompliance does not make the transaction null. The remedy, if granted, will affect only the creditor and the transferee within the purview of the former's claim. In other legal systems, the transaction is given full effect, despite its illicit character; in consequence, the remedy available is aimed not at the assets but at the proceeds, namely, the purchase price or the monetary value of the assets.

One additional observation seems to be appropriate. In Switzerland, Austria, and Italy transfers of enterprises are governed by the general law emanating from the civil codes. In most of the other countries, transfers are considered to be mercantile acts and, consequently, governed by the mercantile law. Even in countries where the dualism of civil and commercial law does not prevail, as, for example, in this country and in Canada, transfers within the coverage of this type of legislation are *de facto* mercantile. Bulk sales acts require that commercial assets be involved, and the Uniform Commercial Code[39] enunciates the rule that

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[37] E.g. German Commercial Code, Art. 27; also Supervielle, *op. cit.* n. 2, 168.

[38] Billig and Smith, "Bulk Sales Laws: Transactions Covered by These Statutes," 39 W. Va. L.Q. (1933) 323.

Questions of similar nature arise also in cases of recent nationalizations. In Great Britain, elaborate provisions are contained, e.g. in the Coal Industry Nationalization Act, 1946, Sec. 7; in the Transport Act, 1947, Sec. 14; and in the Iron and Steel Act, 1949, Sec. 13 and 14. In France, provisions are simpler. The act concerning nationalization of electricity and gas enterprises (1946) states that "L'ensemble des biens, droits et obligations des entreprises . . . est integralement transféré aux services nationaux . . ." (Art. 6); the act nationalizing certain insurance companies (1946) provides that such enterprises "demeurent tenues des engagements antérieurs" (Art. 6).

[39] Sec. 6–102 (3), rev. ed. 1957).

"enterprises subject to this Article are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell".[40]

(3) *Debts.* With regard to debts which entitle the creditor to privileges offered under this type of legislation, three questions will have to be discussed: what type of debts enjoy these privileges; against whom such claims may be enforced; and up to what amount may this be done.

(i) With regard to the kind of debts subject to these provisions legal systems vary considerably. There are jurisdictions which allow any creditor to benefit regardless of the nature of his claim, (e.g. Switzerland, Germany). The same rule applies under the bulk sales acts which offer not only business creditors but those whose claims may arise out of torts, domestic relations, or some other noncommercial ground, privileges under the acts.[41] A similar liberal attitude is displayed by the French act which opens the door to "*tout créancier du précédent propriétaire.*"[42]

As would be expected, the more common rule is that the debt be related in some way to the enterprise or the assets involved, a requirement prevailing in legal systems adhering to the automatic method.[43] Some countries require that the debt be evidenced in a particular way. That it has to appear on the commercial books of the transferred enterprise or that it was properly filed, is required by Uruguay[44] and Peru[45] in non-sanction situations. The first limitation is adopted in the Italian Code in regard to commercial enterprises.[46] A special kind of debts is introduced in Cuba by Order 400; though creating no liens on the enterprise, they will pass with it making the transferee jointly liable, while noninscribed debts pass with the enterprise only if parties failed to comply with the law concerning such transfers, i.e. as sanction.[47]

Finally, there are classes of creditors to be mentioned who, in various jurisdictions, are entitled to additional privileges, as, for example, those contained in the list; who filed their claims properly; who formally oppose

[40] There seem to be large areas of agreement with regard to transfers remaining outside of these provisions; generally, statutes, here and abroad, exclude among others, transfer by judicial sales, assignment to creditors, for security, etc.

[41] See n. 32 *supra*; also 3 Williston, The Law Governing Sales of Goods, (1948) 470 and 10 Tul. L. Rev. (1935) 131; 84 A.L.R. 1406 and 102 A.L.R. 565; *cf.* Evans v. Herbranson, 41 N.W. 2d 113 (1950).

[42] Art. 3(4).

[43] Germany, Commercial Code, Art. 25; Austria, Civil Code, Art. 1409; Greece, Civil Code, Art. 479; Argentina, Art. 8(1); Peru, Art. 2 and 3.

[44] Art. 2.

[45] Art. 2.

[46] Art. 2560 (2) of the Civil Code.

[47] Art. 10.

the transfer. Their position varies considerably, and discussion may be omitted. One group, however, deserves to be mentioned. They are creditors with claims arising out of contracts of employment. Under the Austrian Employees Law of 1921,[48] widely copied in Central Europe, white collar workers have their severance pay (*Abfertigung*) guaranteed in cases of transfer of the business. Another instance is Argentina where claims arising out of discharge run with the enterprise.[49] The Italian Civil Code makes the transferee of an enterprise liable for claims arising out of the employment contract.[50]

(ii) The answer to the second question who is responsible for debts is fairly simple. First of all, there is always the original debtor, the transferor who, as a rule, remains liable after transfer. Thus, change can only occur with regard to the transferee. As already indicated he may accede to the debt and become liable jointly with the transferor; or he may become the sole debtor which would mean that by alienating the assets the transferor has relieved himself of the debts as well. It may be stated that, generally, legal systems prefer the first alternative, a rule expressed by the Peruvian law that "action may be brought against either one or the other . . . or against both of them attaching in either case the enterprise transferred as well as the other assets of the persons so liable."[51]

In jurisdictions adhering to the quasi-fraudulent approach the transferee becomes a constructive trustee ("receiver for the benefit of the creditors")[52] of the assets transferred which makes his liability virtually one of the *cum viribus* type. In a few jurisdictions additional persons may made liable because of their co-operation in the illicit transfer, as, for example, the auctioneer, the broker, and the notary.[53]

(iii) The last question is one concerning limitations of such liability. Generally, unlimited liability is an exception. It is adopted in the German Commercial Code;[54] however, the harshness of the rule is mitigated by

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[48] Art. 23.

[49] Art. 147 (4) of the Commercial Code as amended in 1934, apparently relying on Art. 11 of the Italian decree regarding private employment contracts (1924), Mazzoni-Guarrieri, Codigo delle leggi sul lavoro (1950) 463.

In France claims arising out of dismissal (Code de Travail, Art. 23) enjoy privileges of liens according to Art. 2101 (4) of the Civil Code.

[50] Art. 2112.

[51] Art. 4.

[52] ". . . liable as receiver for the fair value of all the property so transferred to him," Louisiana R.S. 9: 2963. Billig and Brauch, "The Problem of Transfers under Bulk Sales Laws: a Study of Absolute Transfer and Liquidating Trust," 35 Mich. L. Rev. (1937) 732.

[53] France, Art. 13 (2) of the law of June 29, 1936 supplementing the 1909 act; Argentina, Art. 11.

[54] Art. 25.

the dispositive character of the provisions involved. On the other hand, quite a few jurisdictions use unlimited liability as a sanction in cases of illicit transfers, as for example, Cuba,[55] Uruguay,[56] and Venezuela.[57]

In nonsanction situations liability is limited in one of the following ways: by the value of the assets at the time of the transfer (Austria, Greece); by the assets involved plus claims arising out of the underlying transaction (Germany);[58] or by the assets alone, in most cases where bulk sales acts apply. In jurisdictions utilizing the purchase price as a fund, the liability in cases of illicit transfers is determined by this amount in one of the following ways. In France the payment of the purchase price in noncompliance situations is not effective as against third persons; hence creditors may demand a second payment, and this time into proper hands.[59] In Argentina not only the transferee but also the auctioneer, the broker, and the notary, provided they took part in the illicit transfer, become liable for the amount of debts remaining unpaid because of their noncompliance with the law, but never more than the amount of the purchase price.[60] In this respect, Puerto Rico goes one step further and, in case of an illicit transfer, holds responsible the transferee for the full value of the enterprise or goods transferred.[61]

Finally, it has to be pointed out that in some countries the liability of any participant in the illicit transfer may be based on general responsibility for damages arising out of illicit acts. In some countries this type of liability is imposed by statute. In Argentina responsibility may arise from "omissions and violations of provisions of this act."[62] In Cuba Order 400 allows damages arising out of the fact that creditors have been omitted from the required list.[63] However, serious doubts exist whether or not this type of legislation creates claims in favor of private persons for damages caused by illicit transfers.[64]

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[55] Order 400, Art. 15.

[56] Art. 4.

[57] Art. 152.

[58] Art. 419 of the Civil Code.

[59] Art. 3 (8).

[60] Art. 11.

[61] Tit. 10, Sec. 1720, Laws of Puerto Rico Annot. (1954); see also n. 87.

[62] Art. 11.

[63] Art. 14.

[64] Significant is the French decision in Ponticelli v. Tissier, Cass. 1949, Sirey 1950.1.81 where it was properly held that in view of Art. 3 (8) of the act, noncompliance with requirements does not make the transferee personally liable; he is only prevented from invoking his illicit payment of the purchase price against creditors. However, in this case the court granted the creditor his claim not as the transferor's debt but as general damages under Art. 1382 of the Civil Code.

(4). *Methods.* The various legal systems have used two main methods to forge available devices into a workable whole capable of coping with the situation: the precautionary and the automatic.

(i) *The precautionary method.* Here the main effort is directed to the protection of creditors by imposing upon the parties to the transfer the duty of complete and timely disclosure. Publicity may be achieved in different ways. The underlying transaction may be required to be reduced to writing or in a formal instrument, e.g. notarial act. In some countries the instrument has to contain information beyond the essentials required for the transaction. In France, for example, the instrument has to give data concerning the transferor's predecessor, privileged claims, figures showing gross receipts for the past three years as well as profits for the same period, and data on leases, if any. It is to be pointed out that the sanction for noncompliance is surprisingly harsh: not only is the transferor liable for the exactness of these data jointly with the broker and the drafter of the instrument—a rule of imperative nature—but the transfer itself may be declared null and void at the request of the transferee in cases where one of the data is lacking in the instrument.[65]

Another means to achieve publicity is to require such instrument to be registered[66] or made available to creditors for inspection.[67] In addition, various countries demand mainly two kinds of information to be made available. One concerns the assets involved; particularly the bulk sales acts[68] impose upon the transferor the duty to give detailed information in this respect. The other information concerns creditors. A list containing their names, addresses, and amounts due has to be handed over by the transferor to the transferee who, as a rule, has the duty to notify the creditors of the intended transfer. In order to be effective, such notifications shall be made before payment (Costa Rica,[69] France,[70] Newfoundland[71]), before the instrument is executed (Argentina[72]), before the

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[65] Art. 12 (2) of the 1935 law, cited in n. 53; *cf.* Cazaubon v. Richard, Bordeaux, 1946, Sirey 1957.158.

[66] E.g. France, Art. 1 (1); Cuba, Art. 14; Honduras, Art. 394 (I) (c); Venezuela, Art. 25. In a few jurisdictions in this country, recording is required to make the transfer licit, e.g. recording of important data regarding the transfer in the office of the county recorder in California (Art. 3440, 3 Civi. Code); similar provisions appear also in Connecticut, Rev. Gen. Stat. Sec. 6705 (1949) and Arizona, Code Annot. Sec. 58-301 (1939).

[67] France, Art. 5 (1).

[68] See n. 32 *supra*.

[69] Art. 3.

[70] Art. 3 (8).

[71] Art. 5.

[72] Art. 4.

transferee takes possession (Venezuela,[73] Uniform Commercial Code[74]), or before the sale (New York[75]). In addition, some or all of the data available are made public in an official gazette, in legal journals, in designated newspapers, or simply in the local paper.[76]

In regard to subsequent alternatives available to creditors, there are two objects determining the course of action: one, the assets, and the other, the purchase price. The first is adopted as a target by the bulk sales acts offering creditors the possibility to avoid the illicit transfer. The second alternative concentrates on the purchase price, completely releasing the assets transferred. It is to be expected that such schemes are bound to become complicated. One of them is the institution of opposition by creditors against the transfer. By taking advantage of this device creditors may stop payment of the purchase price in the hands of the transferee (France,[77] Argentina[78]); in consequence, the price will be deposited to be divided later among creditors. Two countries even give opposing creditors the opportunity to try for a better price. Costa Rica grants the right to make a higher bid provided creditors show that the purchase price is ten per cent below the reasonable price.[79] France requires that the bid is one sixth higher than the purchase price of the *fonds*, exclusive of fixtures and merchandise.[80] In case such bid is not forthcoming, the moving creditor must take the *fonds* for a price determined by the court.[81] This rather complicated set-up imbedded into the intricate substantive and procedural law of France certainly made more difficult the task of adapting this model to Argentine use. So it happened that instead of *surenchères* Argentina introduced a seemingly simpler rule but one much more difficult to apply, namely that "no alienation of an enterprise . . . may be effectuated for a price below the sum total of the debts . . .".[82]

In legal systems where stop-payment is one of the devices used to protect creditors, the transferee is generally required to hold the purchase

[73] Art. 151.

[74] Sec. 6–105.

[75] Personal Property Law, Sec. 44 (1).

[76] In Honduras the transfer of an enterprise has to comply with provisions regarding corporate mergers if the transferor is a corporation (Art. 649); the same rule appears in the Mexican draft (Art. 617).

[77] Art. 3 (*indisponibilité du prix*).

[78] Art. 4.

[79] Art. 4 (2).

[80] According to Art. 1 (3), specific prices shall be allocated to the "incorporeal elements" of the fonds, to fixtures, and to merchandise.

[81] Art. 23 (6).

[82] Art. 8.

price or to deposit it in court (France[83]) or in a national bank (Argentina[84]). Moreover, some countries impose upon the transferee an unexpected burden, namely that of enacting an *ad hoc* bankruptcy. If possible, such distribution should be made in an "amiable" way (France[85]). Under the Newfoundland act, a trustee has to be appointed to distribute the purchase price in accordance with the provisions of the bankruptcy act. With good reason the Uniform Commercial Code is reluctant to press for adoption of this rule; however, in step with her previous statute Pennsylvania has adopted these provisions together with the Code.[86]

A unique solution reviving the doctrine of *laesio enormis*[87] is adopted in Puerto Rico, where in addition a bulk sales act of the New York type also is in force. According to the amended Commercial Code,[88] the transfer of a commercial enterprise or of the whole or the greater part of its stock is presumed to be fraudulent whenever precautionary measures have not been complied with and the alienation was gratuitous or for not more than half of the market price. Then creditors have "an action to have the effected alienation rescinded and . . . the proper value of the enterprise or of the stock sold, deposited" in court. What this seems to provide is that the transferee is to pay the true value of the assets, which means that only one element of the underlying transaction will be "rescinded," the price. In case the transferor has already paid the price, the rule might be interpreted that he has to pay a second time, this time the full price and into court.

(ii) *The automatic method.* While under the precautionary method compliance with the rules keeps transfers out of the reach of the special laws altogether and makes them, in regard to creditors, safe from attack, the automatic method relies on a different solution. Here rules controlling transfers apply to all transfers, and the passing of debts is imposed as a normal consequence. Paraphrasing an old adage, it may be said that *indebitatus est quem bona demonstrant.* Of course, such automatic running of debts with the assets transferred may also be used by legal systems

[83] Art. 4 (1).

[84] Art. 4.

[85] Art. 6.

[86] Pa. Stat. Annot. Tit. 12 A, Art. 6–106 (1954).

[87] Laws of Puerto Rico Annot. Tit. 10, Sec. 1720 (3). According to this provision the only instance in which a mercantile act may be rescinded because of lesion is the one mentioned above. It is to be added, however, that *laesio enormis* offers a remedy only to parties to the contract and not to third persons. Parker, "Lesion Beyond Moiety," 4 Tul. L. Rev. (1929) 73; Thayer, "Laesio Enormis," 25 Ky L. Rev. (1937) 321, also Dawson, "Economic Duress and Fair Exchange in French and Roman Law," 11 Tul. L. Rev. (1937) 346, 364.

[88] The Commercial Code of 1886, as amended April 25, 1930. It is to be noted that Puerto Rico has also a bulk sales act, Laws of Puerto Rico Annot. Tit. 10, Sec. 61.

of the precautionary type. This occurs particularly as a sanction in cases of illicit transfers. In case parties comply with the rules, only a strictly defined class of debts pass with the enterprise, for example, debts inscribed in the commercial register (Cuba[89]), or debts appearing on the commercial books of the enterprise as well as those filed during the period of announcements (Uruguay,[90] Peru[91]). On the contrary, in cases of illicit transfers the transferee will have to assume all debts without exception (Cuba,[92] Uruguay,[93] Peru,[94] Venezuela[95]), always jointly with the transferor. Outside of these particular situations, this group of legal systems shies away from automatic assumption of debts. This applies particularly to the bulk sales type of legislation; it is also strongly emphasized in France.[96] Nevertheless, the fact that the transferee has "a known place of business in this State, who becomes bound to pay the debts of the transferor in full and gives public notice of that fact, and who is solvent after becoming so bound" will, according to the Uniform Commercial Code, take the transfer out of the reach of provisions governing bulk sales.[97]

A variant to the rule of joint liability of both the transferor and the transferee is to be found in the Swiss Code of Obligations.[98] The joint liability lasts only for two years after which time the transferee is substituted completely. The rule is adopted by the Mexican Draft where the period is shortened to six months.[99] Outside of this particular situation, the rule of a privative, instead of a cumulative, assumption of debts by the transferee is adopted only by the Honduran Commercial Code, which, at variance with its Italian model, provides that a "transfer of an enterprise includes all debts incurred in the conduct of the same by the prior owner."[100]

Two observations may be added here. One regards the imperative or dispositive nature of rules governing the automatic passing of debts. It may be stated that older enactments, (e.g. the Swiss and German

[89] Art. 10.
[90] Art. 2.
[91] Art. 2.
[92] Art. 15.
[93] Art. 3.
[94] Art. 3.
[95] Art. 152.
[96] Société Borg Turco Abella v. Trésorier, Cass. Civ. 1950, Sirey 1951.1.154, *cf.* n. 105 *infra*.
[97] Sec. 6–103 (6).
[98] Art. 181 (2).
[99] Art. 621 (2).
[100] Art. 649.

Commercial Codes), permit parties to exclude this effect, while more recent enactments show a definite tendency to make these rules imperative in favor of creditors (e.g. German Civil Code, Austria, Greece). As it is to be expected, claims arising out of employment contracts are given this effect (e.g. Italy[101]).

The other remark regards the effect of a transfer on final judgments (*titulus executionis*) obtained against the transferor. Both Uruguay and Peru[102] declare such judgments to be enforceable also against the transferee.

(5). *Credits.* The rule making credits run with the enterprise was first adopted by the Swiss Code of Obligations and the German Commercial Code. The Italian Civil Code[103] took up the idea, but adopted only a cautious provision that credits related to a transferred enterprise and assigned to the transferee may validly be paid to the transferee even without notice, from the moment when the transfer is properly registered; however, the debtor affected will be discharged in case he has paid to the transferor in good faith. The same rule appears in the Honduran Commercial Code[104] as well as in the Mexican Draft.[105]

(6). *Contracts.* Up till now the discussion has been limited to specific claims or debts already arisen. It now remains to discuss the impact of transfers on contractual relations which may produce claims or debts in the future.[106] Legislative patterns have been set by the Italian Civil Code.[107] Keeping the rule dispositive in nature, the Code provides that the transferor succeeds to contracts negotiated for the enterprise, except contracts of a personal nature. Nevertheless, the other party may rescind the contract within three months since transfer has been notified to him, provided there is just cause for rescission. Of course, the transferor remains liable according to the contract. The same rule is adopted in the

[101] Art. 2112 and 2113 of the Civil Code; see also n. 109.

[102] Art. 4 resp. 5.

[103] Art. 2558.

[104] Art. 651.

[105] Art. 620. On the contrary, French cases point out that "créances possedées par un commerçant, même pour une cause commerciale, ne deviennent pas nécessairement un élément du fonds de commerce; que si, au cas de vente du fonds, elles peuvent être comprises dans l'operation en vertu d'une convention expresse des parties . . . ," complying with Art. 1690 of the Civil Code, i.e. cession (Société Borg Turco Abella, Cass. 1950, Sirey 1951.1.154).

The Newfoundland act (n. 22) lists accounts receivable under the term "stock," Art. 2 (i) (iv).

[106] In common law, the problem appears as a question of assignability of benefits arising out of a contract; *cf.* Tolhurst v. Associated Portland Cement Manufacturers, [1902] 2 K.B. 660, [1903] A.C. 414; Kemp v. Baerselman, [1906] 2 K.B. 604; Nokes v. Donkaster Collieries, [1940] 3 All E.R. 549. For civil law, see Steinwenter, Vermögensübernahme und Vertragsübernahme, 52 Zentralblatt für juristische Praxis (1934) 401.

[107] Art. 2112; *cf.* Gaspari, L'azienda nel diritto del lavoro (1937).

Honduran Commercial Code[108] and in the Mexican Draft[109] except that here the period is extended to six months.

Special provisions apply in some countries to employment contracts. An example of this kind is contained in the French *Code de Travail*[110] providing that "all labor contracts in operation at the time of such changes (i.e. succession, sale, etc. of the *fonds*) continue between the new acquierer and the personnel of the enterprise". A similar rule, imperative this time, is adopted in the Italian Civil Code.[111]

Conclusions

At first glance the protection available to creditors under the precautionary method would appear to be less effective than that which is offered through the running-with-the assets device used mainly in civil-law countries. By its simple forcefulness the latter seems impressive while the precautionary appears weak and, because of its Paulian approach, almost outdated.

Such conclusions could only be reached as a result of a superficial comparison. Sound evaluation requires consideration of a legal institution as part of the legal system within which it operates. It must be seen not in isolation but in conjunction with the other remedies therein available. In this perspective the comparative deficiencies read into the precautionary method are compensated by the fact that in the countries where it prevails a large selection of additional devices is available. Most of them are easy to constitute and are given effective enforcement. This almost infinite line of devices includes various types of securities adaptable because of the flexibility of title, furthermore, chattel mortgages and equipment trusts, as well as various devices made possible by the versatility of accounts receivable and the several types of commercial documents, including trust receipts.

On the contrary, in countries relying mainly on the automatic method, particularly in Latin America, we find that many of these devices are not available or are now being introduced into a rather hostile legal climate. Long established dogmatic prejudices prevent either their adoption altogether or their coming into full operation. This leaves most of these countries with the simple automatic method as one of the few means devised to protect creditors and foster the growth of an economy based on sound credit. It is not, therefore, surprising that, in the other group of countries, there is neither desire nor need for introducing the automatic method or any of its features.

[108] Art. 650.
[109] Art. 619.
[110] Art. 23.
[111] Art. 2113.

Comments

THE FOSTER DAUGHTER-IN-LAW SYSTEM IN FORMOSA

I. The Foster Daughter-in-Law Custom in Formosa

This article is an attempt to introduce Western readers to a peculiar aspect of Chinese family law which results from the structure of the oriental family. In the first place, the term "family" comprises more than simply husband, wife, and children. Under the Chinese, as well as the Formosan system, if somebody founds a family, all his children, grandchildren, and further descendants will be members of the same family, which forms a legal entity, presided over by a head who is usually the oldest and most respected member of the group.[1] This family group is interested in common affairs, has a family council not without influence, and in the past dealt with many legal matters, both civil and criminal, within its own limits. Marriage, adoption, and similar affairs were thus not only of concern to the parties immediately involved, but to the entire group. Disregard of the interests of the family could, and can, be sanctioned by the head through temporary expulsion from the common home or through cancellation from the official family register. A person thus expelled establishes his own family register. We thus find families varying in size from only one individual up to several hundred. Authors like Pearl S. Buck have made the American reader familiar with the close emotional coherence of the Chinese family, the common ancestor worship, and the elaborate formalities of family ceremonies. A marriage was a great event for the two families concerned, and the solemnization was accompanied by great feasting, gift exchanges, and many complicated ceremonial observances. All this came to be too expensive for the poorer part of the population, and thus an "evasive" custom developed. Usually, the family of the male partner to the intended marriage would take a young girl into the family as a foster daughter-in-law. The adoption of the foster daughter-in-law was a fairly simple matter. An informal contract was concluded by the parents of the two parties concerned, usually arranged by a go-between who brought the two families together; thereupon, the young girl became a member of her future husband's family. Solemnization of the marriage could then take place without further complications upon the simple order of the male partner's father. Until then the young couple lived separately in the same home, and the adopted foster daughter-in-law occupied a position much like that of an ordinary daughter of her fostering family. This custom has long been in existence on the Chinese main-

[1] According to the Chinese Civil Code of 1931, Art. 1123, every family is to have a head, who may be recommended by the members of the family. If no such recommendations are made, the oldest man or woman of the family is to be the head. If such a person is unable, or refuses, to assume the position, he or she can appoint someone to act in his or her name (Chinese Civil Code, Art. 1124).

land, at least since the Sung and Yuan dynasties;[2] it was brought to Formosa by the Chinese immigrants, who came to the island of Formosa in the fourteenth century A.D. Foster daughter-in-law contracts were usually concluded between families of the same town or village; although it was not totally absent in the cities, the custom was more widely practiced in rural areas.

An institution similar to the Chinese existed in Japan for similar reasons. The girl, however, would be taken into the male partner's family as a regular adopted daughter, and not as a foster daughter-in-law. In the Japanese adoption contract, future marriage of the adopted child was not implied; she could thus marry any of the real children of the adopting family, or none at all.[3] In China and Formosa, marriage between a regular adopted daughter and a son of the family was considered incestuous. In a foster daughter-in-law contract, the object of future marriage had to be expressly stated, and the future husband had to be named individually. It was not possible to conclude a legally valid contract of this kind for the purpose of marrying the girl to "any of the sons of the family." After the occupation of Formosa in 1896, the Japanese government recognised the native custom in spite of many critics who favored the introduction of the Japanese custom of ordinary adoption. One of the opposing opinions insisted that the foster daughter-in-law custom was contrary to the principle that a marriage had to be undertaken with the free consent of both man and woman. To this argument, the authors of the "*Mens Legislatoris of Formosan Family Law and Law of Succession*"[4] answered as follows: "If we provide that 'When they want to marry, both the young man and the young woman must obtain each other's consent. If one party does not consent, the other party may dissolve the foster daughter-in-law contract,' the objection can be removed. Such criticism could be made not only against the foster daughter-in-law contract, but also against the Japanese adopted-daughter contract." Another opinion which criticized the Formosan custom insisted that the typical foster daughter-in-law contract involved the "sale" of a human being. Against this opinion, the "*Mens Legislatoris*" stated that such an evil could be found not so much in the foster daughter-in-law custom which provided for a definite future husband but rather in the (Japanese) adopted-daughter custom, where a future husband need not be specified. "A contract by which a girl only formally obtains the name of a foster daughter-in-law, but in reality is nothing but an adopted daughter, is not recognized by this draft."

In the subsequent parts of this article we shall try to give a systematic

[2] 11th century A.D.

[3] *Cf.* J.O.C.C. Art. 769 (New Code Art. 734): "The lineal and collateral relatives within three degrees of relationship cannot marry each other, but an adopted child may marry collateral relatives of its adoptive parents."

[4] Taiwan Sinzoku-Sōzoku-Lei Rippō-Riyūsho, published in 1914 by the Temporary Committee for the Investigation of Taiwan Old Customs, stating the motives for the three drafts for Formosan legislation drawn up by the Committee.

account of the foster daughter-in-law custom as it was practised under the Japanese rule over Formosa. Although no written laws concerning this custom were ever enacted under the Japanese administration, the interpretation of the Chinese custom by the Japanese judges was actually made in accordance with the spirit and the system of the Japanese Civil Code, whose concepts and mode of arrangement will thus be used in this article. Actual cases were not frequent, nor were the decisions always consistent, so that our framework has in part to be conjectural. It is hoped that it will nevertheless serve to acquaint the reader with the legal implications of a peculiar custom, which at this time is no longer recognized by official law.

Upon the liberation of Formosa at the end of World War II, when the Chinese Civil Code of 1931 was extended over the island, on Oct. 25, 1945, the foster daughter-in-law custom ceased to be sanctioned by law.[5] According to current law, marriage is a contract to be concluded by means of a simple ceremony in the presence of two witnesses, not unlike that of other countries with civil law systems.[6] Officially, the need for the complicated and expensive ceremonies which brought about the foster daughter-in-law custom thus no longer exists. But custom changes but slowly, and thus we still find many foster daughter-in-law arrangements today, although without legal validity. The description given in this article and the consideration of the custom as such are thus not devoid of actual significance.

II. Formosan Status Law during the Japanese Regime

Under the Ch'ing Dynasty,[7] there were applied in Formosa a number of codes and legal provisions which contained almost exclusively criminal or administrative law. Private law was chiefly dealt with by private contracts and popular customs. The Chinese legislation scarcely enacted any law interfering with daily life, unless public interests were at stake. Civil cases could be brought before the administrative officer who also exercised the judicial functions. Usually he would order the parties to see the peacemaker, who ordinarily would be an aged person or headman in a village or the head of the clan or the family, and who would act as a mediator. Even in cases of minor criminal offenses, compromise or private punishment outside the courts was often resorted to.

At the beginning of the Japanese occupation of Formosa in 1896, governmental and judicial functions were controlled first by the military administration and then by the Governor-General. In his work on the Formosan law of the Japanese period, Professor Yen Fui Tai of the College of Law, National Taiwan University,[8] has divided the Japanese reign over Formosa into two

[5] *Cf.* Yen Fui Tai, "Formosan Legislation During the Last 50 Years," The Quarterly Review of Taiwan Culture (Taipei, 1949), vol. 5, No. 1 (in Chinese).

[6] Chinese Civil Code of December 26, 1931, Art. 982.

[7] 1685–1895 A.D.

[8] See *supra*, note 5. The author is greatly indebted to the work of Professor Tai.

periods, the Period of Statutes (Ritsu-Ryō), and the Period of Imperial Ordinances (Tyokurei). The statutes enacted during the first period were mostly applicable to Japanese residents in Formosa only, while the native affairs were left to the established customs. After about 1919, the Japanese government began an assimilative policy by extending to Formosa the more important Japanese laws through Imperial Ordinances.

Of particular importance was the "Imperial Ordinance No. 407," of 1922, which enumerated the so-called "Exceptions in Putting the Legislations in Force in Formosa" (Taiwan ni sikōsuru Hōritsu no Tokurei ni kansuru Ken). In Article 5 it provided that, "For affairs concerned with family law or law of succession among Formosans, the respective provisions of the Japanese Civil Code are not applicable; decisions are to be made according to Formosan custom." The Japanese government thus realized that the customs concerned with family law or law of succession were so much on the basis of native thought and feelings that it was impossible to abolish them abruptly. Thus from the cession of Formosa to Japan by the Ch'ing dynasty in 1896 till the restoration to China in 1945, Formosan status affairs were continually decided according to the native customs. But the Japanese government gradually altered Formosan customary law by judicial precedents, especially registry decisions, i.e. decisions concerning the entries of status matters upon the register of civil status, and sought gradually to come closer to the Japanese Civil Code. The alterations concerned with the custom of foster daughter-in-law will be described below.

The Formosan native customs mainly originated in the different customs of the several groups of Chinese immigrants, who came to Formosa in successive waves between 1372 A.D. and 1895 A.D.[9] One group of immigrants, the so-called Fu-lao people, came from Min-nan; some came from the Mei Prefecture—the K'o-chia people; the small remainder came from many different provinces. The so-called "High Mountain Race" (Kao-San-Tsu) of Malay stock, who had been in Formosa before the Chinese immigrated and who now number about two hundred thousand, secluded themselves in the mountains. Their customs were different from those of the Chinese immigrants and will not be dealt with here. At the beginning of the Japanese occupation of Formosa, it had been about three hundred years since the end of the Chinese immigration. Each district had its own circumstances, and thus new customs had developed which came to differ from those of the mainland. Although, because of the poor state of communications, no uniform customs could develop for all of Formosa, the customs in the different districts were fairly similar to one another.

In 1900, Japan established the "Temporary Committee for the Investigation of Taiwan Old Customs," which rendered its reports in 1911. Native customs should govern the affairs concerned with Formosan or Chinese immigrants' family law and law of succession. However, the Japanese judges hardly under-

[9] 1372 A.D. (Ming Dynasty); 1895 (beginning of the Japanese domination).

stood the old customs, and, even if they did, they tended in their decisions to conform to the rules of Japanese law. The Formosan customs were, of course, not codified. The so-called "*Rules of Registration of Civil Status*" (Kokō Kisoku) was no source of law, but a description of the official administrative records made according to this Rule had declaratory value.

The three Drafts of Formosan Family Law and Law of Succession made by the Temporary Committee for the Investigation of Taiwan Old Customs are noteworthy even though they were never given statutory effect. Apparently, the original Japanese policy of noninterference with Formosan customs was the principal reason for their compilation. But in view of the initiation of the assimilative policy, the Drafts were not given the force of law. Also, insofar as the customs were found to be incompatible with Japanese policy, they were abolished or modified by the Committee so as to make them conform with the spirit of the Japanese Civil Code. As far as there were no customs, the Committee tried to fill the gap by new provisions, most of which were similar to those of Japanese Civil Code. These Drafts, although they were never enacted into law, were of considerable help to the courts.

III. Conclusion of the Foster Daughter-in-Law Contract

The foster daughter-in-law contract contains elements of both marriage and adoption. Both these elements have thus been of influence in the shaping of the rules concerning the conclusion, the effects, and the termination of the relationship.

Parties Concerned—According to Formosan native customs, the parties to the foster daughter-in-law contract were not the foster daughter-in-law and her future husband, but the parents of the foster daughter-in-law or her ascendants in her family, and her future husband's parents or his ascendants in the adopting family. In this respect, it was similar to the conclusion of an ordinary marriage contract. Both the Second Draft (Marriage, Article 69) and the Third Draft (Article 115) provided that: "The foster daughter-in-law contract shall be concluded by a conference of the fathers of the families of boy and girl concerned." Later, the Japanese government concluded that in this form the custom was contrary to modern civilization, as it failed to take into consideration the intentions of the boy and girl themselves. The custom was thus sought to be gradually transformed by judicial decisions. The parents of both sides were treated as the agents rather than as the parties to the marriage contract. In an ordinary contract of adoption, the courts came to regard as the parties the adopting parent(s) and the adopted child rather than the adoptive parent(s) and the real parent(s) of the adopted child. Although the problem of determining who precisely were the parties to a foster daughter-in-law contract was never expressly decided in any published judicial opinion, it would seem that in such a contract the foster daughter-in-law and her adoptive parents were to be regarded as the parties. If the former was below the age of 15 years, the consent of her parents or ascendants was necessary to the contract. (Japanese (old) Civil Code, Article 843).

The Adoptive Parents—In an ordinary adoption, the minimum age for an adopting parent was 20 years (J.O.C.C., Article 837; see also Chinese Civil Law (C.C.L.), Article 837). For a foster daughter-in-law adoption, the same minimum age was required. J.O.C.C., Article 841, provided that: When adopting a child, a married person should not act without his or her spouse. (J.N.C.C., Article 795; C.C.L., Article 1074). But, as to Formosa, it was stated in the Second Draft (Marriage, Article 69, clause 3) as well as in the Third Draft (Article 118) that: "The wife of the adopting father has only the right to consent to the foster daughter-in-law contract," that is to say, the father and mother in the adoptive family did not have to adopt jointly. By Formosan native custom, a widow was permitted to adopt a son only for her dead husband. A single woman could adopt a child neither in the Ch'ing period nor in that of the Japanese regime. But an unmarried woman ("Tsai-Shih-Nü") was permitted by the Japanese officers of civil status to register the foster daughter-in-law adoption of a girl as the prospective wife of her natural son. Since there also exists a case by which a stepfather or stepmother were permitted to register the adoption of a stepdaughter, a foster daughter-in-law adoption would also seem to have been possible in such a situation. A guardian could not adopt his ward as his foster daughter-in-law (J.O.C.C., Article 840, clause 1; J.N.C.C., Article 794). A concubine[10] could not join her keeper as a party in a foster daughter-in-law contract when he wanted to adopt a girl for a son of his born by his legal wife. But if her keeper wanted to adopt a foster daughter-in-law for his son born of his concubine, the latter would join him as a party to the contract. In such a case, the girl obtained the status of a foster daughter-in-law of the concubine, but only that of an illegitimate daughter-in-law to the concubine's keeper.

The Foster Daughter-in-Law—Generally, the foster daughter-in-law was a girl of tender age, usually in her early teens. No minimum or maximum age was ever stated clearly in any judicial opinion, but the Third Draft (Art. 113) stated that no girl of more than 14 years of age could be adopted as a foster daughter-in-law. This, however, became neither law nor custom. If one fostered a girl older than the minimum legal marriage age (15 years), the marriage between one's foster daughter-in-law and one's son could be solemnized immediately. In analogy to J.O.C.C., Article 744, it was decided that one could not adopt the sole heiress of another family.

Substantive Requirements—Since the contract affected the foster daughter-in-law, it could not be concluded between the parents of both sides without paying attention to her interests. Such attention was regarded to have been properly given if the contract was made for her by both her legitimate parents. If, however, she was below the age of 15 and she was the child of an illegitimate mother or a widow, the contract could not be made by her mother without the consent of the family council of her family. (J.O.C.C., Art. 773; Art. 843, 2;

[10] One could legally keep a concubine under Japanese law (J.O.C.C., Art. 827). The keeper's wife stood in the relation of a "legitimate mother" to the acknowledged children of the concubine by her keeper.

Art. 846, 2). If one of her parents was missing, dead, had severed relations with the family, or was incapable of expressing his or her intentions, the remaining parent could be the sole party to the contract (J.O.C.C., Art. 772, 2; Art. 846, 1). The Second Draft (Marriage, Art. 69), and the Third Draft (Art. 115) were to the same effect. They also provided that "if a grandparent of the foster daughter-in-law is the head of the family, he or she can be party to the contract."

If a person died leaving a will providing for the adoption of a foster daughter-in-law, the foster daughter-in-law contract was considered as effectively concluded if the surviving spouse expressed his or her agreement either before or after the death of the deceased spouse. This was similar to the provisions for "adoption after death" (J.O.C.C., Art. 848).

Consent—To foster a daughter-in-law or to be fostered as such is a matter of importance to the entire families concerned. The consent provisions concerning a foster daughter-in-law contract were thus similar to those of an adoption or a marriage contract. Both adoptive parents of the foster daughter-in-law thus had to obtain the consent of their parents before jointly adopting a foster daughter-in-law (J.O.C.C., Art. 844), since the parents of the adoptive parents are considered to have common family interests with the foster daughter-in-law once she is being fostered in their families, and relationships of lineal affinity arise between them. If one of the parents of the adoptive parents was not available, the consent of the remaining one was sufficient (J.O.C.C., Art. 846, 1). The consent of a stepparent of the adoptive parents also had to be obtained. If the stepparent or the legitimate mother refused to consent to the contract, the consent of the family council could be substituted therefor (J.O.C.C., Art. 846, 2). A girl of marriageable age, i.e., of 15 years and above, who was to become a foster daughter-in-law to another family, had to obtain the consent of her real parents, even if she had previously been a foster daughter-in-law or an adopted daughter in another family (J.O.C.C., Art. 845). Apart from this, the Third Draft, Art. 116, provided that an adoptive father's consent should be obtained, too. If one of the foster daughter-in-law's real parents was not available, the consent of the remaining parent sufficed (J.O.C.C., Art. 772, 2; Art. 846, 1). If both of her real parents were dead or not available, and she was not yet 20 years old, the consent of her guardian and of her family council was required (J.O.C.C., Art. 772, 3; Art. 846, 1). If she had no real parents but only stepparents or a legitimate mother who refused to consent, the foster daughter-in-law contract could nevertheless be concluded with the consent of the family council (J.O.C.C., Art. 773; Art. 846, 2). If the girl's father was not the head of the family, the head's consent was required in addition to the father's (J.O.C.C., Art. 750). The consent of the head of the family also had to be obtained in the adopting family. Otherwise the head could cancel the names of the adopting parents from the family register or expel them from the family home for a period not to exceed one year (J.O.C.C., Art. 750, 2; Rule of Census Registration, Art. 18 and 22). If

the adoptive parents did not obtain the consent of the head of their family, the foster daughter-in-law had to be fostered in the family of the adopting parents, which as a legal entity came into existence through the expulsion of the adopting parents from their original family (J.O.C.C., Art. 750, 3).

Monogamy—Both the Second Draft (Marriage, Art. 68) and the Third Draft (Art. 114) provided that the foster daughter-in-law contract had to conform with the principle of monogamy. It was therefore voidable if the prospective husband was already married (J.O.C.C., Art. 766).

Prohibition of Incest—Since marriage was the main purpose of the foster daughter-in-law contract, the contract was void if it was entered into by close relatives who fell under the incest provisions. As such were regarded all relatives of lineal consanguinity and all relatives of collateral consanguinity up to the third degree (Second Draft, Marriage, Art. 68, 1; Third Draft, Art. 114; J.O.C.C., Art. 769; J.N.C.C., Art. 734). If one had adopted a foster daughter-in-law for his son and the contract was afterwards dissolved for some reason, it was unlawful to foster the same girl afterwards as one's own future wife (J.O.C.C., Art. 770 and 771; J.N.C.C., Art. 735 and 736). There was, however, no provision against marriage among persons related by collateral affinity. If, for instance, the foster daughter-in-law died before she was married to her future husband, he could marry her sister or obtain her sister as his future wife by another foster daughter-in-law contract. If the future husband had died, the foster daughter-in-law could marry the deceased's brother or become the foster daughter-in-law for the brother by a new contract.

In ancient China the incest provisions covered all persons having the same surname. While this extreme rule could be considered as abolished under the Japanese rule, it nevertheless remained a moral obligation.

The foster daughter-in-law had to be fostered in the adoptive family. If a contract was concluded without the intention of the girl living with her adoptive parents as a foster daughter-in-law, the contract was regarded as one of engagement only ('Ting-Hung'), and not as a foster daughter-in-law contract.

Formal Requisites—The customary requisites for the contract were an oral or a written agreement between the foster daughter-in-law, the adoptive parents, and the go-between, without whose co-operation no foster daughter-in-law contract could validly be made in Formosa. It was, furthermore, necessary that there be paid the engagement money, which consisted in a modest amount of much lesser value than the expenses involved in a marriage. Finally, the girl had to bow to the parents of her future husband.[11] However, according to judicial practice, no particular formalities had to be obeyed in the conclusion of the contract.

Both in the Second Draft (Marriage, Art. 71) and the Third Draft (Art. 120), it was stated that a foster daughter-in-law contract would become effective

[11] The middleman served the parties to become acquainted with one another and to communicate the intentions between the parties. A contract concluded in Formosa without the action of a middleman, was void (Taiwan Private Law, vol. 2, p. 418).

upon being entered upon the civil status register of the adopting family. But contrary to the Japanese Civil Code (J.O.C.C., Art. 775, Art. 847; J.N.C.C., Art. 739, Art. 779) which makes registration a constitutive requisite for marriage and adoption contracts, Formosan decisions ascribed to the registration only evidentiary value. Whether or not a given marriage or adoption had taken place was thus decided according to the factual circumstances only. Although decisions are lacking, the same rule seems to have applied to the foster daughter-in-law contract. In Chinese native custom, the bride became the wife of her husband on the day of the solemnization of the marriage. Three days later she had to bow to the parents of her husband in the front room which was the center of the house where the mortuary tablets of the family ancestors were kept. Only then did she become a daughter-in-law to the family to which she now belonged. Since the provisions of the Drafts were not enacted as laws, we must consider that, in analogy to the marriage custom, a girl became a foster daughter-in-law and the foster daughter-in-law contract became effective as soon as the bowing to the adoptive parents had taken place.

Upon the conclusion of the foster daughter-in-law contract, the adoptive parents usually presented the girl's real parents with some money ("Ju-Pu-Yin, money for milk"; "P'ing-Chin, money for engagement", "Shen-Chia-Yin, money for the body"), to compensate them for the loss of their daughter.[12] The presentation of this money was no necessary requirement for the validity of the contract. If the contract did not become effective, the money presented had to be returned. If, however, the contract was dissolved after its conclusion, the money could be kept by the girl's real parents.

IV. Invalidity of Foster Daughter-in-Law Contract

Nullity—According to the Third Draft, a foster daughter-in-law contract could be void for five causes, viz.: (1) failure to apply registration upon the family register (Art. 122); (2) conclusion of the contract by others than the parties required or without the intent of future marriage of the foster daughter-in-law to a specified son of the family (Art. 123); (3) the intended foster daughter-in-law's being above the age of 14 years (Art. 123); (4) violation of the incest provision (Art. 124; 1); (5) bigamy (Art. 124, 2). Since the Draft was not law, and since the provisions of clauses Nos. 1 and 2 did not coincide with the customs, only the grounds mentioned in clauses Nos. 2, 4, and 5 were of practical significance. In these cases, the contract was void. A judicial decision so finding had only declaratory effect. Such an action for declaration of nullity could be prosecuted by either party to the contract, the future husband, the heads of the families concerned, other relatives, or the public procurator (Art. 124, Japanese Status Suit Procedure). There was no time limit on commencement of the action.

Annulment Concerning the Marriage Aspect of the Contract—A suit for annul-

[12] The payments were made in cash, precious metals, food, clothes, or cattle, in the value of between 2 and 60 Yuan, which is more than the value of a trinket or a head of cattle.

ment could be brought by any person who had a right to consent to the contract and whose consent was not obtained, as well as by any person whose consent was obtained by fraud or threat (J.O.C.C., Art. 783). This right to sue belonged exclusively to the person whose consent was not obtained, or had been obtained by fraud or threat. It terminated with the death of that person, unless that person was a guardian, in which case the right became vested in the successor to the guardianship. The annulment suit had to be filed with the court within six months after the person whose consent had not been obtained became aware of the conclusion of the contract, or after the fraud was detected or the threat had ended (J.O.C.C., Art. 784; Art. 857, 2). If a necessary consent was obtained by fraud or threat after the conclusion of the foster daughter-in-law contract, the right to sue for annulment ceased two years after the fraud had been discovered or after the threat had ended (J.O.C.C., Art. 785). In addition to these reasons, the Third Draft mentioned two further causes for annulment, viz., "mistaken identity," which should rather have been considered a ground of nullity of the contract, and "serious mistake with regard to an essential characteristic of either boy or girl" (Art. 125).

Annulment Concerning the Adoption Aspect of the Contract—In case of the adoption of a foster daughter-in-law by a minor, the contract could be annulled by the minor's guardian or by the minor himself within six months after he became of age (J.O.C.C., Art. 853). If a person older than the adoptive parent was adopted as a foster daughter-in-law, the contract could, without time limitation, be annulled by the parties, the head of either family, or by certain other relatives (J.O.C.C., Art. 854). In case of the adoption of a foster daughter-in-law by her guardian, both the girl and her family could sue for annulment. If the girl, however, confirmed the contract, or if six months had elapsed after the administrative settling of her estate, the right of annulment was extinguished (J.O.C.C., Art. 855). If one did not jointly adopt the foster daughter-in-law with one's spouse, consent was considered as given, if such spouse did not sue for annulment of the contract within six months after he or she came to know of the contract (J.O.C.C., Art. 856). Until it was annulled by judicial decree, the voidable contract was valid (J.O.C.C., Art. 787, 1; Art. 859).

V. Effects of the Foster Daughter-in-Law Contract

Relation between the Foster Daughter-in-Law and her Future Husband—Since the foster daughter-in-law contract was not equivalent to a marriage contract, the future husband had no right to demand that the foster daughter-in-law live with him. She must, however, live in the adoptive family. Her legal capacities were not restricted like those of a wife.

Relation between the Foster Daughter-in-Law and her Prospective Husband to the Kindred of Each Other—Although a marriage relationship was not yet constituted through the conclusion of a foster daughter-in-law contract, a certain relationship between the future couple and each other's families was already created thereby, which one may loosely define as one of a "son-" or

'daughter-in-law." In former times, there existed the possibility of "buying" a foster daughter-in-law, in which case there was only a relationship between the girl and the future husband's family, while no relationship between the future husband and the girl's real family came into existence.

The Foster Daughter-in-Law's Family Name—By native customs as well as case law, registry decisions, and the Third Draft (Art. 129), the foster daughter-in-law was to bear the name of her adoptive family together with her "maiden name." If a child was born before the marriage, it had to be given the adoptive family's name.

Parental Authority and Guardianship—It was doubtful, who was to be considered as the actual bearer of the parental authority over a foster daughter-in-law. Normally, the real parents retained parental rights, while the adoptive parents obtained a right of admonition, or limited parental rights as far as necessary within the framework of the common household. In the Third Draft, it was stated, however, that "if a foster daughter-in-law is a minor or an interdict, the person of parental authority toward her future husband may similarly exercise parental authority over her" (Art. 130, 1). What the actual situation really was cannot be decided, since there were no judicial decisions.

Rights and Obligations of the Adoptive Parents—The adoptive parents were obliged to maintain the foster daughter-in-law in their family according to the standards of such family. A subsidiary duty of this kind existed for the future husband or those other relatives who would contribute to the family maintenance. In addition, the adoptive parents owed the responsibility to unite the boy and the girl in marriage.

Rights and Obligations of the Foster Daughter-in-Law—One of the main obligations of the foster daughter-in-law was the natural reverence expected from a young girl toward her adoptive parents. Under the Japanese regime, the head of the family occupied a position of power over the entire family and thus also over the foster daughter-in-law. The foster daughter-in-law had the legal rights of an unmarried woman and could own her own property.

The Marriage—Since inability to bear the burden of the expenses of an ordinary Chinese marriage was the reason for the foster daughter-in-law system, one could not expect to find an elaborate ceremony at the end of the foster daughter-in-law period. Sometimes, the adoptive parents would inform the girl's real parents that on such and such a day the marriage was to be solemnized. Then a modest feast would be given to relatives of both sides. But among the less fortunate ones, the adoptive father or the family head would simply one day permit the young people to move into a common bedroom or they would be given a double bed.

VI. Termination of the Foster Daughter-in-Law Relationship

By Marriage—Marriage was the object of the foster daughter-in-law contract and thus its most normal end. The adoption aspect of the contract disappeared with the marriage to the designated future husband. Should the

future husband, however, die or refuse to marry the girl, and should she choose nevertheless to stay with the adoptive family, the contract was not dissolved and, although the aim of the contract had now become unattainable, the girl's status was not changed to that of an ordinary adopted daughter.

Dissolution by Agreement—The foster daughter-in-law contract could be dissolved as any ordinary contract by agreement of the contracting parties without any particular formality or special causes (J.O.C.C., Art. 808; Art. 862, 1; Art. 862, 2). In addition, it was stated in the Third Draft (Art. 132, 1), that, if the boy or the girl were of marriageable age (16 resp. 14 years), their consent to the dissolution was to be obtained. Article 133 of the Third Draft stated that either the boy and the girl could dissolve the contract after reaching marriageable age. If the parties dissolving the contract were below the age of 25, they had to obtain the consent of the same persons who had a right of consent to the conclusion of the contract (J.O.C.C., Art. 809, Art. 863).

According to the Third Draft (Art. 135; also J.O.C.C., Art. 810, Art. 864), the registration of the dissolution should be a necessary requisite. This rule never became effective, however.

Dissolution by Judicial Decree—The Third Draft stated the following reasons for dissolution by judicial decree (Art. 139, 1): (1) bigamy, (2) illicit sexual intercourse, (3) conviction of certain serious crimes, (4) cruelty or grave insult of either the boy or the girl against the other, (5) cruelty or grave insult of one against a lineal ancestor of the other, (6) cruelty or grave insult of one of the lineal ancestors against the boy or the girl, (7) absence of the boy or the girl for more than three years, (8) incurable insanity or leprosy after a period of three years. In the cases of misconduct, the right of action was excluded if the other party had consented to the act of misconduct or if the other party was guilty of the same kind of misconduct. These provisions were almost identical with those regarding divorce, both of the J.O.C.C. and the Third Draft. To what extent these rules were really observed in practice is difficult to say, since there are no reported cases. The customs basically coincided with these grounds for dissolution, without however giving exact details as to the extent of a grievance necessary to be a ground for dissolution. In most cases, under the old Chinese system, equity arbitration would have been sought. The persons having a right to sue for dissolution were the same as those mentioned above as those whose consent was required to constitute the relationship, as well as the party who had suffered from the misconduct in question (Japanese Status Suit Procedure, Art. 25–26).

Effects of Dissolution—The dissolution of the foster daughter-in-law contract terminated the relationship of engagement between the young people as well as all relationships between the foster daughter-in-law and her adoptive family. It was, however, decided that it was against *bonos mores* to admit a girl as her former foster father-in-law's concubine. Such an application[12] was con-

[12] Application to have the girl's civil status registered as that of a concubine to her former foster father-in-law.

sidered null and void. A certain prohibited marriage restriction thus remained in spite of the dissolution, the extent of which could not be determined, however, because of the lack of reported cases.

At the dissolution of the foster daughter-in-law contract, the girl reacquired her status as a daughter to her natural family and also lost her adoptive family's name.[14]

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ITALY'S CONSTITUTIONAL COURT: PROCEDURAL ASPECTS

Breaking sharply with tradition, the framers of Italy's postwar Constitution provided for a Constitutional Court with authority to guard the basic charter from being violated. A strong, independent judiciary with a controlling voice over constitutional interpretation has not heretofore been a feature of Italian government, nor for that matter has it been characteristic of the major governmental systems of Western Europe. Postwar developments in France, Germany, and Italy have thus represented departures from the continental tradition. France today has a Constitutional Committee, West Germany has a Federal Constitutional Court, and Italy has a *Corte Costituzionale*.[1] With these judicial organs each country in its own way has sought to limit the abuses and excesses of popular government, especially immoderate legislative action. Here we are concerned only with the Italian model, and the reader is reminded at the outset that the experience is one of months, not years.

Unlike the United States Supreme Court which began to function within

[1] See Gottfried Dietze, "Constitutional Courts in Europe," 60 Dickinson Law Review 313 (June 1956); David G. Farrelly, "The Italian Constitutional Court," 1 Italian Quarterly (Summer 1957) 50.

eleven months after the American Constitution became effective,[2] the Italian Constitutional Court did not become a reality until *eight years* after the Constitution of the Republic went into force. The Italian Constitution of 1947 became operative on January 1, 1948. However, it was not until five years later, in March 1953, that the parliamentary situation allowed the necessary enabling legislation to be passed which established the Court. The next task was to provide judges for the Court, and here there were difficulties because of the complicated selection process. Fifteen judges were to be chosen—one third elected by the Higher Magistracy, one third elected by Parliament in joint session, and one third appointed by the President of the Republic. Acting promptly, in March 1953, the Higher Magistracy elected five jurists to membership on the Court. (Three of these original selectees died before they could take office, but replacements were quickly chosen in each instance.) Speedy action was not forthcoming from Parliament, however. Two years and nine months went by before intense partisan politics finally yielded to the essential compromises which then resulted in the election of five parliamentary judges. The log jam broken, President Gronchi then appointed his five judges in early December 1955. At long last with all fifteen judges present, the oath-taking ceremony took place on December 15; and on January 23, 1956, the Court held an organizational meeting.

Elder statesman Enrico De Nicola was chosen by the judges to be the president of the Court. One of Gronchi's appointees, De Nicola brought a wealth of practical experience in public affairs to the Court. He had served as Provisional President of Italy for two years right after the war. Now, at seventy-eight years of age, he left his position in the Senate, where he was a permanent member, to take up his new duties. With a distinguished reputation for integrity and leadership, De Nicola was a natural choice of the judges to direct the work of the Court.[3] Two months were needed now to develop rules of procedure and attend to innumerable housekeeping matters. On April 23, 1956, the Court began its official life when, following an inaugural address by president De Nicola, the first public hearing was held.[4]

Italy's equivalent of Article III of the United States Constitution is contained in Articles 134–137 of the Constitution of the Italian Republic.[5] These articles provide for a fifteen-judge Constitutional Court and grant it power of judicial review over the laws and acts of the national government and the regional councils of Italy. Provisions for the jurisdiction and procedures of the Court are brief and relatively simple. Article 134 states that the *Corte* shall judge:

[2] Charles Warren, The Supreme Court in United States History (1926), Vol. I, pp. 46–47.

[3] Biographical sketches of the judges are contained in 5 Italian Affairs 1223 (May 1956).

[4] De Nicola's speech is reprinted in Pasquale Curci, La Corte Costituzionale (Milano, Giuffrè, 1956) at p. 9.

[5] An English translation of the Constitution is found in A. J. Peaslee, Constitutions of Nations (Rumford Press, 1950), Vol. 2, pp. 275–302. Our quotations *infra* are from this version which was translated by the American Embassy staff in Rome.

"Disputes concerning the constitutional legality of laws and acts having force of law enacted by the State and the regions; conflicts of jurisdiction between the powers of the State and conflicts between the State and the regions and between regions; charges preferred against the President of the Republic or the ministers in accordance with the provisions of the Constitution."

Article 137 provides for enabling legislation and finality of decision:

"The conditions, the forms, and the time limit for the examination of decisions of constitutional legality are established by constitutional statute, as are the guarantees for the independence of the judges of the Court.

"Other regulations necessary for the formation and functioning of the Court are established through ordinary legislation.

"No appeal against the decisions of the Constitutional Court is admitted."

It is our purpose to focus on the procedural aspects of the Constitutional Court, leaving for another writing a detailed discussion of judicial review and an analysis of the interesting jurisdictional problems that the Court has had to face. Thus limiting our research, we will here devote attention primarily to the technical side of the Court's work. However, a few general remarks are needed concerning the position of the Court, the scope of its activities, and the role of the ordinary courts in legislative review.

Italy's break with the past was a radical one. The framers of the Constitution saw the necessity of creating a judicial organ competent to decide whether laws were enacted in conformity with the basic document. For two particular reasons such a court was imperative: basic rights of citizens were guaranteed in the Constitution, and autonomous regions were established. These features of the new Italy required protection against governmental interference by lawmakers and law-enforcers. Accordingly, the Constitutional Court was charged with the following tasks: (1) to decide on the constitutionality of laws and acts passed by the State and the regions; (2) to determine conflicts of jurisdiction that may arise between the State and a region; (3) to settle jurisdictional disputes between regions; (4) to act as a court of impeachment whenever charges are made against the President or the ministers of the Republic. A fifth task, that of passing upon questions for a popular referendum, will be a responsibility of the Court when Parliament provides for this device of direct democracy.

It is important to understand that the Constitutional Court is a special tribunal. The constitution makers did not build a completely new judicial system. In essence what they did was to add something unique—a Constitutional Court—above and outside the regular court structure. While there does exist a pyramidal, judicial hierarchy with a supreme court at the apex, the *Corte Costituzionale* is not an integral part of this system. Therefore, it may be asked, Do the ordinary courts play any role in judicial review? Previous to the adoption of the postwar Constitution, the function of the regular courts was limited to an examination of the formal legitimacy of statutes. By virtue of Transitory Article VII of the Constitution these ordinary courts were author-

ized, for the first time, to pass upon the constitutionality of laws until the Constitutional Court began to operate. Now that the Court is functioning, the regular judges are again restricted largely to their traditional duty of deciding upon the formal legitimacy of statutes. Thus, the ordinary courts determine whether a law has been validly enacted, whether it meets all of the requisites which are essential for the very existence of a statute. Such a declaration is definitive, but its effects are limited to the immediate case before the bar. As we shall see, the regular judges do possess certain discretionary powers involving the transfer of cases to the Constitutional Court.

The *Corte Costituzionale* was created under the theory of concentrating control over the constitutionality of legislation in this one special judicial organ. However, the theory has been compromised by Parliament which established a High Court for Sicily (by constitutional statute in 1948) and gave it jurisdiction over all laws and acts affecting the autonomous region of Sicily. The High Court for Sicily was functioning before the Constitutional Court came into being, and it has handed down some important decisions. Thus, there exist at the present time two special courts possessing concurrent jurisdiction over Sicilian constitutional questions. This is an anomalous situation, but the obvious remedy (abolition of the High Court for Sicily) is up to Parliament which has so far failed to take corrective action.

There was considerable discussion among Italian jurists over the problem of the Court's role in reviewing anterior laws, that is, old statutes enacted in the Imperial and Fascist periods. This controversy began with the adoption of the Constitution, and in subsequent years it attracted the attention of the general public as well as students of jurisprudence. Several schools of thought emerged and the periodical literature is extensive. Bascially, of course, if the Court's power could not extend to a review of pre-Republic laws its function and usefulness would be severely restricted. The Italian Constitution and the enabling statutes relative to the Court are silent on the question of anterior laws, and speculation and theorizing gained momentum. It would be tangential to our purpose, however, to discuss the details of this extremely interesting juridical problem. Suffice it to say, the Constitutional Court brushed all polemic arguments aside in its first decision, holding that any anterior laws contrary to the preceptive norms of the Constitution must be subject to review and invalidation by the Court.

While the functions and jurisdiction of the Court are set forth in the Constitution, a knowledge of the basic procedures of this special body can only be derived from close examination of the enabling legislation and the Court's rules. As authorized by Article 137 of the Constitution, the functional and procedural workings of the Court are established through legislation. Parliament has enacted three statutes to implement this constitutional mandate.[6] Two of the

[6] Legge Costituzionale 9 febbraio 1948, n. 1 (in Gazzetta Ufficiale 20 febbraio 1948, n. 43); Legge Costituzionale 11 marzo 1953, n. 1 (in Gazzetta Ufficiale 14 marzo 1953, n. 62); Legge 11 marzo 1953, n. 87 (in Gazzetta Ufficiale 14 marzo 1953, n. 62).

statutes are constitutional laws and one is an ordinary law.[7] These statutes have also been supplemented by the Court's own regulations, *Integrative Rules for the Decisions Before the Constitutional Court*, approved March 16, 1956.[8] The three laws and the Court's rules govern the entire procedure.[9] These sources of information reveal how the constitutionality of an act or law may be challenged and how the Court operates. It is with the procedural aspects of the Court that we are mainly concerned here.

Private Parties. A private citizen has no standing to question the constitutionality of a law or an act by bringing it directly to the attention of the Court. Thus, there is no original jurisdiction available to an individual; no suit, request for a declaratory judgment, or action of any kind may be initiated there. The only way a person may challenge the constitutionality of a law or act in the Court is by means of a case that has originated elsewhere. An opportunity exists if a case begins in a regular court of jurisdictional authority (*autorità giurisdizionale*) and is transferred to the Constitutional Court. Transfer is contingent upon action taken in a lower court, and there are two ways that it may be brought about.

First, an individual may raise the issue of constitutionality in the course of ordinary litigation if he indicates that a law or an act needs to be invalidated. He may argue that a particular statute contradicts the Constitution, or he may argue that some particular act by the government is in violation of the Constitution or a constitutional statute. In the event of either allegation, the jurisdictional authority shall immediately order the case transferred to the Constitutional Court for a decision. However, the jurisdictional authority itself may render a judgment definitely independent of the constitutional issue, or it may decide that the issue of constitutionality is unfounded. Thus, in effect, the jurisdictional authority controls the case insofar as transfer is concerned, and there is no right of appeal by the party to the *Corte Costituzionale*.

The second possibility again depends upon the jurisdictional authority and

[7] Parliamentary consideration and procedure for constitutional statutes is more exacting than that required for passage of ordinary laws, a distinction found in many systems of government. A constitutional statute is a law directly affecting the Constitution. It must be adopted by each chamber of Parliament in two successive deliberations with an interval of not less than three months, and on the second vote in each chamber approval must be by an absolute majority of the membership. Constitution, Art. 138. An ordinary law in Italy requires the presence in each chamber of an absolute majority of all its members, but a majority of those in attendance may then adopt the bill. Constitution, Art. 64.

[8] The Court was authorized to adopt its own rules by Ordinary Law, March 11, 1953, Arts. 14, 22. Rules approved by the Court on March 16, 1956, were published in Gazzetta Ufficiale 24 marzo 1956, n. 71.

[9] Materials used in this study have been drawn almost entirely from the three statutes and the Rules of the Court. We have avoided extensive footnoting which would only pinpoint the references to the laws. However, we will call attention to the Court's Rules as they affect procedures. In terms of understanding the functioning of the Court, the Ordinary Law of March 11, 1956, is the most important statute; it is a lengthy document containing over 50 articles. Needless to say, perhaps, some sections are ambiguous.

not the parties to the litigation. On its own initiative, the jurisdictional authority may raise the question of constitutionality during the trial, and it can then order the case transferred to the Constitutional Court.

Obviously, a citizen is not privileged to approach the Constitutional Court directly in order to have his constitutional rights determined against a law under which his life, liberty, and property are endangered.[10] Since the merits of his test of constitutionality and the transfer of his case are controlled by the jurisdictional authority, an adverse decision leaves him with no recourse. The Constitutional Law of March 11, 1953, does require that the rejection of the constitutional issue must be explained fully to the party by the jurisdictional authority, but there is no other organ which can review the adequacy and correctness of the explanation. In other words, the decision and opinion of the jurisdictional authority is final; there is no appeal.

When a case is transferred to the Court, the jurisdictional authority must indicate the reasons for the transfer. As soon as the case arrives at the Court the president must order it reported in the Official Gazette of the Republic, and, if appropriate, it must also be published in the Official Bulletin of the region which may be concerned with the issue. Within twenty days after the transfer, the party to the case may examine the file deposited in the Chancery Office of the Court, and written arguments may then be submitted. At this time also, depending upon which level of government is involved, either the president of the Council of Ministers or the president of the regional *giunta* (Executive Committee) may intervene and present the arguments of the government.

Government as Party. Procedure is entirely different in an action brought by the State or by a region. The distribution of powers among the organs of the State and the division of powers between the central government and the regions is directed by the Constitution and supplemented by constitutional statutes. Jurisdictional problems among these various units and levels of government have been anticipated, and the Constitution vests in the *Corte Costituzionale* the function of settling such disputes as may arise. Whenever such conflicts occur, the State or region may apply directly to the Court for a decision.[11] Also, the two provinces of Trentino Alto-Adige, Bolzano and Trento, have been granted special access to the Court; both are bi-lingual provinces, each possessing considerable local autonomy.

Rules of procedure require that an application for a decision be filed with the Chancery Office of the Court within certain time limits. In general, the time limitations are related to the two types of questions that may be brought

[10] Arturo Orvieto, "Le Tre Più Interessanti Questioni che la Corte Costituzionale Decidera," Corriere Della Sera, (Milano), April 3, 1956, p. 3.

[11] Before the Constitutional Court was established numerous cases were brought to the regular jurisdictional authorities in accordance with Art. 7 of the Transitory and Final Provisions of the Constitution. After the *Corte Costituzionale* came into being all these pending cases were transferred to it for settlement.

to the Court. The Ordinary Law of March 11, 1953, distinguishes two different types of action that may require settlement of the rights of the State or a region; namely, a question of constitutionality, and a conflict of authority.

On questions of constitutionality, the national government may challenge the validity of a regional law within fifteen days after the president of the Council of Ministers has received official notice of the statute. Notification involves a communication from the president of the regional *giunta* that the said law has been approved by his regional council. On its part, a region may challenge the constitutionality of a national law within thirty days of its publication in the *Gazzetta Ufficiale*. As between regions, one of them may challenge the constitutionality of another's statute within sixty days after publication of the law. Still another situation exists—one in which a region may ask the Court for a judgment *sustaining* its law. This latter type of action is possible if the national government raises before the chambers of Parliament the matter of the constitutionality of a statute approved by a regional council, and does so on grounds that the law is contrary to the national interest or is in conflict with the interests of another region. Under these circumstances, the region whose law is being questioned in Parliament may apply to the Constitutional Court for a judgment on the validity of its own statute. This application to the Court must be made within fifteen days from the date the issue was raised in Parliament, and the Prime Minister as well as the presidents of both chambers of Parliament must be notified by the region within the same time limit.

On the second type of action that can come before the Court, a uniform time limitation prevails. In cases involving a conflict of authority between the national government and the regions, or between regions, application for a judgment must be made to the Court within sixty days from the publication of the law in question. In every instance, the application must set forth the facts which gave rise to the controversy, the sphere of authority allegedly invaded, and the part of the Constitution or constitutional statute that has been threatened with violation. This type of case involves another ingredient, too.

While a case involving conflict-of-authority is pending before the Court, the judges have the power to suspend the execution of the act which gave rise to the litigation. At the same time an order of the Court must be given which explains the reasons for suspending the operation of the act.[12] And the suspension can only be given for grave or serious reasons. This is an important power for the Court to exercise. It should be noted, however, that the Court's suspension power applies only to matters concerning conflicts of authority between State and region and between regions (and for the special provinces of Bolzano and Trento).

When the State takes the initiative to seek a judgment from the Court, every application for a decision must be authorized by the president of the Council of Ministers. On a regional request for a judgment, the president of

[12] Ordinary Law of March 11, 1953, Art. 40, and Norme Integrative per i giudizi davanti alla Corte Costituzionale, Art. 28.

the Executive Committee or *giunta* signs the authorization. Upon receipt of an application by the Court, and by order of its president, the Chancery Office publishes the case in the Official Gazette, and the defendant party is notified. Moreover, when a national law is involved, the presidents of the Chamber of Deputies and the Senate must also receive notice of the action. If a decree of the President of Italy is involved, he must be so informed.

Court Proceedings. For all cases, whether by transfer involving a private citizen or an original government action, every preliminary procedural requirement must be met before further steps are taken by the Constitutional Court. When all preliminaries are completed, and at the expiration of twenty days after receipt of the case, by transfer or by direct application, the president of the Court appoints one judge to investigate and report the case. The entire file is turned over to the investigating judge by the Chancery Office, and it is the duty of this judge to study the full record and submit his findings to the Court. The investigative-report stage is extremely important, and the investigating judge has power to conduct extensive inquiry. He can, for example, call for parliamentary papers and session minutes, take testimony, receive expert evidence, etc. He can set the date for an oral hearing (ten days notice required to both parties), and, with the assistance of the Chancery Office, minutes are taken for the record.[13] Opportunity is given for parties to file memorials and illustrative materials with the Chancery Office provided there are sufficient copies for the full membership of the Court and for the other party.[14] At the close of the investigation, having settled the evidence, all pertinent materials in the case are deposited with the Chancery Office which then informs the respective parties of this fact.[15]

The report of the investigating justice is submitted to the president of the Court within twenty days following his appointment.[16] Each report contains five elements: (1) a statement of the factual situation from which the incident of unconstitutionality arose or which provoked a conflict of authority; (2) an indication of the parties and the judge who may have ordered the case transferred; (3) the contents of the lower court's order if transfer was involved; (4) the arguments brought forth by each party; (5) the issues ascertained and proved.[17] Based on the report and a discussion with the investigating judge, the president of the Court decides either to set a date for the Court to meet in council or to set a time for a public hearing.[18] The president also determines whether pending cases of similar or related subject matter shall be considered together by the Court.[19] The president can decide this on his own initiative or upon request of the parties.

[13] Norme Integrative, Art. 13.
[14] *Ibid.*, Arts. 10, 11.
[15] *Ibid.*, Art. 14.
[16] *Ibid.*, Art. 8.
[17] Gian G. Stendardi, La Corte Costituzionale (Milano, Giuffrè, 1957), p. 94.
[18] Norme Integrative, Arts. 8, 9.
[19] *Ibid.*, Art. 15.

At this point in the proceedings, it will be seen that there are two alternatives facing the Court. The report of the investigating judge determines which course shall be taken. In the first situation, the president may convene the Court to sit in council for the express purpose of dismissing the case. In the second situation, the president can order the Court to convene for a public audience. Whichever course is taken, the president has another twenty days following receipt of the report from the investigating judge to make a decision as to the date when the Court will meet. Both the law and the rules of the Court require fairly prompt action, although in setting the date the president is authorized to take into account the status of all pending cases.[20] Thus the president is allowed a margin of time at his discretion to call the Court into session. Through the Chancery Office due notice is given as to the next step the Court will take, and at least twenty days must elapse before the Court can meet either in council or in public audience.

The first alternative involves the Court meeting in closed session. When the Court sits in council it does so for the express purpose of dismissing the case. This can be done on two grounds: that there is no cause for action, or that the case is manifestly without foundation (*manifesta infondatezza*). As to the first reason, the law and rules of the Court preclude further discussion or debate when neither of the parties to the action has been able to sustain its arguments for or against the unconstitutionality of the law at issue. Or again, an order for dismissal will result when an issue has already been decided in some previous case. The concept *manifesta infondatezza* is more difficult to explain, but it is apparently reserved for exceptional situations. Thus, for example, the Court may employ this ground for dismissal when a case has been preceded by deliberations in another court and the ordinary judges have already made an initial, predictive evaluation that the cause is manifestly without foundation. Also, the concept implies that the Court will dismiss those cases by council action if they seem to be totally devoid of substantive content. A Court order is used to dismiss a case.

The second alternative calls for a public audience. Hearings of the Court are generally open; however, the president may order them to be held behind closed doors whenever the security of the State or public peace or morals are threatened. At least eleven judges must be present to constitute a quorum of the Court. The hearing is begun with a report by the investigating judge of his findings. After this report, the parties, through counsel, present their arguments and conclusions. Counsel must be either an attorney of the State or a lawyer who has been admitted to practice before the Court of Cassation.[21] Rules of the Court state that counsel must make succinct presentation of the reasons for their conclusions. And the president of the Court guides the discussion, determining the most important points that shall be developed in argument.[22] Dur-

[20] *Ibid.*, Art. 8.

[21] The Court of Cassation is Italy's Supreme Court.

[22] Norme Integrative, Art. 17.

ing all stages of the hearing the Chancery Office is responsible for keeping minutes under the direction of the president. These minutes are then signed by him and the Chancellor. The written record is not to be read except by order of the president who will accede upon a request put to him by either party.

When the public hearing is concluded, the Court organizes to sit in council for the purpose of deliberating the case. Only those judges who have attended all sessions of the hearing are permitted to participate in the council. Decision is reached by an absolute majority vote. The investigating judge votes first, followed by the other judges who vote according to their ages (starting with the most junior), and the president votes last. In the event of an evenly divided vote, that of the president of the Court prevails.

After the vote has been taken, the Court names one judge whose task it is to write the opinion or judgment; his text is later approved by the Court in council.[23] All judges sign the completed opinion or judgment, and the day of signature is the official date of the decision.[24] The identity of the opinion writer is never disclosed.[25] However, it has been suggested that the investigating judge is the one who also writes the Court's judgment.[26] All orders and judgments are promulgated in the name of the people of Italy. They are deposited with the Chancery Office within twenty days of the decision and then made quickly available in mimeographed form for purchase by anyone. All judgments are numbered in progressive order in an annual series. Later they are compiled and printed by the State; the official publication is supervised by one of the Court judges.[27]

A judgment which renders a law or an act unconstitutional must be communicated within two days of its deposit in the Chancery Office to the Ministry of Justice, or to the president of the regional council concerned. Both chambers of Parliament are also notified when a national law is involved so that it may be revised according to the interpreted norms of the Constitution. The unconstitutional part of an act or statute is considered an illegal legislative provision, and it ceases to have effect from the day following publication of the decision in the *Gazzetta Ufficiale*. Decisions affecting parties whose cases have been transferred to the Court from other judicial authorities are transmitted back to those courts. The rules on suspension, interruption, and continuance of the processes in the ordinary courts are not applicable to those cases that have been transferred to the Constitutional Court; thus a judgment is relevant to

[23] *Ibid.*, Art. 18

[24] *Idem.*

[25] *Idem.*

[26] Stendardi, *op. cit.*, p. 97.

[27] Norme Integrative, Art. 29. Raccolta Ufficiale delle Sentenze e Ordinanze delle Corte Costituzionale, Vol. I 1956 (Instituto Poligrafico dello Stato, Libreria dello Stato, Roma). *Parlamento*, a monthly magazine published in Rome, reprints the decisions of the Court, but not the Court's orders. Essentially, *Parlamento* began to perform the same function as the West Publishing Co. and The Lawyers Co-operative Publishing Co. in the United States, i.e., providing advance sheets. But in 1957 not all of the decisions were reprinted in *Parlamento*.

the regular judicial proceedings immediately.[28] Finally, all costs for the test of constitutionality of a law or act in the Constitutional Court are at public expense. Therefore, the Ministry of Finance is charged to adjust the Court's budget whenever it becomes necessary to enable the Court to meet its financial obligations.

Impeachment. The Constitutional Court is also granted jurisdiction to try cases of impeachment against high administrative officials of the State. Italy's President is subject to impeachment for high treason and offenses against the Constitution; the Prime Minister and all the ministers are impeachable for crimes committed in the exercise of their functions.[29] Impeachment must originate in Parliament and be voted by an absolute majority of its members in joint session.

For impeachment trials, the regular fifteen judges of the Constitutional Court are augmented by sixteen aggregate judges. These aggregate judges are elected by Parliament at the beginning of each legislative term from among citizens having the qualifications for election to the Senate.[30] It must be emphasized, however, that Parliament has failed thus far to elect the aggregate judges!

When impeachment is voted, the president of the chamber of Deputies must transmit the act of impeachment to the Constitutional Court within two days. The notice must indicate the charges and the evidence upon which they have been based. Within another two days, the president of the Court must notify the person who has been impeached. In the meantime an investigating judge is appointed from the justices of the Court, and a public defender is assigned if the accused does not have his own counsel. If it is the President of the Republic who is impeached, the investigation must be conducted by the president of the Court himself.

When the investigation is concluded and the report heard, the president of the Court has twenty days in which to set a date for trial. On the date fixed, the president of the Court convokes the membership and the aggregate judges are sworn in. Before the trial actually commences any judge may petition to abstain from sitting in the trial, but counsel for the accused may oppose the plea for abstention as may the commissioner who prosecutes the impeachment. Likewise the prosecution or defense may challenge any judge for cause and demand that he not be allowed to participate in the trial. The Court decides upon the petition for abstention or dismissal immediately, without intervention by the judge whose status is to be decided. Except for a grant of abstention or disqualification, every regular judge and aggregate judge is expected to be present at the trial. Twenty-one judges constitute a quorum of whom the aggregate judges must be in a majority. If a justice misses a single session of

[28] Norme Integrative, Art. 22.
[29] Constitution, Arts. 90, 96.
[30] Constitution, Art. 135.

the trial, he is barred from attending subsequent meetings and may not participate in the final decision.

At the conclusion of the trial the Court organizes itself in council. For each separate charge the president of the Court formulates the questions of fact and law that will be discussed and voted upon. If the trial involves the application of a penalty, the president again formulates the problem to be discussed and voted upon; the norms of the penal code and the Code of Criminal Procedure are observed when applicable. Voting is by age, beginning with the most junior judge, and the president of the Court votes last. In case of a tie vote the decision goes in favor of the accused. The judgment of the Court is read by the president in a public hearing and it is then transmitted to the Ministry of Justice for publication in the *Gazzetta Ufficiale*. The impeachment judgment is irrevocable, although it may be subject to revision if there are new facts or elements advanced which show the innocence of the accused, or if they prove that the facts of the trial did not sustain the final judgment. Following the decision of the Court, civil action based on the impeachment may be brought before the regular judicial authorities.

On the whole, the entire procedure of the Court is relatively simple and reasonable. A new and admirable feature is provision that the total expense of an action in the Court is borne by the State. It must not be overlooked that all cases referred to the Court are essentially public questions; consequently, it is logical for the public to bear the financial burden. Of course in actions transferred from the jurisdictional authorities, private citizens are involved as parties; however, even though an individual may derive immediate benefit from a judgment, the question he has raised is a public one, and on this ground the expenditure of public funds can be justified.

All procedural requirements seem to have been followed by the Court during its first year without any difficulty. The quorum provision caused no problem, and there were never less than thirteen judges participating in the spring and autumn terms of the Court. The time schedule likewise presented no difficulty, although the Court deliberately postponed its initial decision until after the nationwide administrative elections in late May, 1956. The Court took no chances that its first decision might be used to the partisan advantage or disadvantage of any of the political parties. Accordingly, the first judgment was rendered on June 5 and deposited with the Chancery Office on June 14. All but the president, Enrico De Nicola, served a turn or more as investigating justice, so that the work load was quite equitably distributed across the bench. In the thirty-three public hearings held during 1956, two judges acted as investigator-reporters only once while three judges each performed this function on four occasions.

Of course impeachment procedures have not yet been invoked, but without the aggregate judges how can a trial be held at all?

Youngest of Italy's democratic institutions, the *Corte Costituzionale* has completed its first year of life. On the whole, its record of achievement has been excellent. Faced with a backlog of nearly 200 cases, the Court worked hard to get abreast of its docket. By combining related matters it was able to dispose of some 80 cases through 22 decisions and 12 orders issued in 1956. By March of this year the Court had delivered another series of 47 decisions plus orders. Using the first 40 decisions for rough measurement, two thirds of the opinions have concerned conflicts of authority between the State and the autonomous regions. The other third involved individuals and the application of penal laws. Approximately, one out of four statutes in question were held unconstitutional in these earliest decisions. Statistics cannot explain the significance of the Court's work; several decisions were of vital importance. The Court invalidated the Fascist public security laws; it held against the constitutional jurisdiction of the High Court for Sicily; the right of non-Catholic cults to worship freely was upheld. These are but three examples among many important decisions.

By and large in its first year, the Court has established itself as an operating institution. In the main, it has acted conservatively and with prudence, not doing violence to the political traditions of the nation. However, within the brief span of its life there have been two crises which merit attention.

In September last year, De Nicola threatened to resign from the Court. Although many reasons were adduced for his action, it seems primarily that he was disappointed at the lack of responsiveness by the Government to the Court's decisions against the police laws. Personal intervention by Prime Minister Segni dissuaded De Nicola from resigning, and he returned to his post as president of the Court for the autumn term.[31] However, in March of this year De Nicola again announced he would resign, and this time high Government officials and close political friends could not stop him. His resignation has served to focus public attention on the unsolved problems of the Court; namely, the continued existence of the High Court for Sicily, opposition by the Church to the freedom-of-worship decision, Parliament's failure to elect the 16 standby judges who are necessary for trials of impeachment. It has been said also that within the Court there have been differences between president De Nicola and the other judges. Obviously, De Nicola's resignation was prompted by a mixture of motives so it would be wrong to assign a single reason for his leaving. He has, however, decided to return to his place in the Senate, and the Court will now have a much-needed champion in the political arena. During the first difficult year De Nicola performed a great service for his country and for the new institution over which he presided. His successor, Gaetano Azzariti,

[31] See Time (October 1, 1956), p. 34 and 5 Italian Affairs 1526 (November 1956).

is an experienced career magistrate, and direction of the Court's work continues to remain in capable hands.[22]

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[22] On De Nicola's resignation in March 1957 various Italian newspapers were used as source material. One of the best over-all reports on De Nicola's motives was written by Vittorio Gorresio and appeared in La Stampa (Turin), March 28, 1957. Azzariti was unanimously elected by the Court as its president, Corriere della Sera (Milan), April 4, 1957.

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THE FINANCIAL CONSTITUTION (*FINANZVERFASSUNG*) OF WESTERN GERMANY

Federalism is commonly assumed to be a product of circumstances retarding the formation of a unitary state, such as long distances and inadequate communications, or linguistic, ethnic, or religious divisions of a regional character at the time of the foundation of a state.

Measured by these criteria, German federalism under the Basic Law of 1949 is indeed a puzzling phenomenon. In Western Germany size and communications were not obstacles to unitarism. The old lines of division and traditional attachment to regions had been modified drastically by the extensive population shifts and refugee migrations during and after the second World War. A society thoroughly atomized and destratified on an unprecedented scale by the effects of the war[1] seemed to suggest a unitary form of government. During the Weimar period, Germany had already gone a long way toward unitarism, and the Third *Reich* completed this development in 1934.[2]

The framers of the Bonn constitution, however, intended to establish a federal system more decentralized than that of the Weimar Republic, and they were pushed even farther in this direction by the instructions and interventions of the occupying powers.[3] For this reason, and because the Soviet Zone of Germany was to remain outside the new state, the framers preferred to call their work a Basic Law rather than a constitution and emphasized its provi-

[1] See also Thomas Wellmann, "Die soziologische Grundlage der Bundesrepublik Deutschland," 79 Deutsche Rundschau, (no. 6, June, 1953) 591–600.

[2] The Law on the Reconstruction of the *Reich* of January 30, 1934 abolished the *Länder* legislatures and transferred the sovereign rights of the *Länder* to the *Reich*.

[3] For a documentary history of the drafting of the Basic Law, see Klaus Berto von Doemming, Rudolf W. Fuesslein, and Werner Matz, "Entstehungsgeschichte des Artikel des Grundgesetzes," Jahrbuch des öffentlichen Rechts, ser. 2, I (1951) 1–926.

sional character in several articles.[4] Of the eleven *Länder* (states) in the new Federal Republic,[5] only Bavaria could look back to a long history and tradition in its present form. It seemed to be a foregone conclusion that this federal system would become centralized, or even unitary, as soon as Western Germany regained her freedom of action.[6]

German critics of the Basic Law advanced many more reasons why the federal arrangement was inappropriate for Germany and unlikely to last: Politicians felt that this high degree of decentralization meant going back to the constitutional framework of 1867 or the Bismarckian Empire, and that the multiplication of governmental agencies was a waste that a poor and defeated country could not afford. Others contended that the postwar economic chaos and the exposed international position of Western Germany made a strong centralized government imperative. As late as 1954, a historian argued that the autonomy of the *Länder* to spend federal funds without federal supervision[7] was impracticable under the standards of modern public finance, and that the trend toward a consolidated federal administration of finances[8] was emphasized by the inadequacy of the existing substitutes. He conceded, however, that federalistic checks such as the absolute veto of the upper house, the *Bundesrat*, over the expansion of the federal administration, could at least theoretically prevent such a development.[9] But according to other commentators,[10] the very existence and participation of the *Bundesrat* in federal legislation and administration induced the national parties to concentrate on the

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[4] Preamble, art. 23 and 146. Grundgesetz der Bundesrepublik Deutschland, mit Besatzungsstatut (Kevelaer: Butzon & Bercker, 1953) pp. 8, 13–4, 45. (Hereafter referred to as *Grundgesetz*).

[5] Nine today, after three states in the southwest merged into Baden-Württemberg. The other borders were drawn mostly according to the circumstances and expediencies of the military occupation. Since January 1957, the Saar has become the tenth *Land* of the Federal Republic. Berlin is still not in possession of the full rights of a *Land*.

[6] As a by-product of the efforts to integrate Western Germany into the Western defense system, her sovereign rights were restored one by one by the Western Allies. Since 1952, to an increasing degree, the Federal Republic would have been able to modify its federal system. In May, 1955 Western Germany became completely sovereign. See Josef L. Kunz, "The London and Paris Agreements on Western Germany," 49 American Journal of International Law, (Apr., 1955) 210–6. Also William W. Bishop, Jr., "The Contractual Agreements with the Federal Republic of Germany," and Herbert W. Briggs, "The Final Act of the London Conference on Germany," *ibid.*, 125–47, 148–65.

[7] See art. 106 (3) and (4); also art. 109. Grundgesetz, pp. 36–7.

[8] Under the Weimar Republic, the creation of a consolidated federal administration of finances had modified German federalism to a great extent. In 1949, therefore, great care was taken to avoid a similar development.

[9] Karl F. Vialon, "Die Stellung des Finanzministers," 9 Deutsche Zeitung, (no. 24, March 24, 1954) p. 2, col. 1–3, and p. 11, col. 2–3.

[10] See Weber, Werner, Spannungen und Kräfte im westdeutschen Verfassungssystem, (Stuttgart: Friedrich Vorwerk, 1951), pp. 48–9, 72–4; "Glosse," 9 Neue Juristische Wochenschrift, (no. 11, March 23, 1956) 413; Allemann, Fritz René, Bonn ist nicht Weimar, (Köln-Berlin: Kiepenheuer & Witsch, 1956) 353–4; and Theodor Eschenburg, "Reform des Bonner Grundgesetzes," 9 Deutsche Zeitung, (no. 29, Apr. 10, 1954) 4.

Länder and local elections in order to ensure the governing coalition of concurrent majorities in both houses.[11]

Adenauer's coalition of Christian Democrats, Free Democrats, the German Party, and a Refugee Party indeed controlled majorities in both houses, the *Bundestag* and the *Bundesrat*. After the elections of 1953 it even possessed the two-thirds majorities necessary for amendments of the Basic Law. There is reason to believe that this partisan control contributed to the co-operation of the two houses, at least in matters of social policy and foreign affairs.[12] However, on questions specifically pertaining to the federal system where its veto cannot be overridden, the *Bundesrat* surprisingly held its own regardless of party lines.[13] In this manner, the upper house has been a powerful restraint upon the expansion of the federal administration at the expense of *Länder* administration of federal laws. On several occasions it thwarted the development of a "mixed administration," i.e. one in which federal authorities could give direct instructions to *Land* authorities.[14] Its guardianship of German federalism has been especially evident in the crucial field of the financial relationships between the federal government and the *Länder*, the very field which more than any other factor had brought about the centralization of governmental powers under the Weimar Republic.[15]

It is an example of this defense of *Länder* interests and the federal system by the *Bundesrat*, and a landmark in the evolution of the new German federalism, that this paper attempts to report: the adoption of a permanent "financial constitution" (*Finanzverfassung*) by the Federal Republic of Western Germany.

The Constitutional Background

According to article 107 of the Basic Law, as amended in 1953,[16] the federal legislature was required to make a final settlement in regard to the distribution of revenue between the two levels of government.[17] The original deadline for

[11] Recent examples can be found in the interference of the leading national parties in the formation of the present cabinets of Bavaria, Hesse, Lower Saxony, and North Rhine Westphalia. See also "Koalitionstaktik," 9 Deutsche Zeitung, (no. 97, Dec. 4, 1954) 5, col. 3–4.

[12] See Herbert Ohlsen, "Gleichschaltung," 79 Deutsche Rundschau (no. 10, Oct., 1953), 1009–11, and Walter Dirks, "Koalitionen," 10 Frankfurter Hefte (no. 1, Jan., 1955) 1–2.

[13] See also R. W., "Streit um die Bundestreue," 9 Deutsche Zeitung (no. 30, Apr. 14, 1954) 1, col. 3–4; 2, col. 4.

[14] In this connection the *Bundesrat* opposed federal grants for the purpose of financing the fiscal administrations of the *Länder*. It also objected strongly to federal supervision of the administration of grants-in-aid and even more to the establishment of federal field agencies to administer the grants. See Deutscher Bundesrat, Verhandlungen, 139. Sitzung (Apr. 1, 1955) 76–9.

[15] Under the series of economic catastrophes weakening the Weimar Republic, the smaller states would have been unable to carry on without the generous grants-in-aid of the *Reich*. By 1926 even as large a state as Bavaria had to depend heavily on federal funds.

[16] Bundesgesetzblatt, I (Apr. 20, 1953), 130.

[17] The taxes concerned were all under the concurrent jurisdiction of the federal government and the *Länder*. While the Federation has sweeping legislative powers over the taxes of the *Länder*, the consent of the *Bundesrat* is necessary to any law affecting them. Art. 105 (2) and 107, Grundgesetz, pp. 35–6.

this final settlement had been December 31, 1952, but it was subsequently extended to 1954 and finally to 1955.[18]

It was clear from the beginning that this final determination of the vertical distribution of tax revenues would also raise problems concerning the equalization of financial burdens among the *Länder*, since the Federal Republic is too small to tolerate the glaring inequality of public services which would arise from the differences in the amounts of revenue raised locally.[19] There was also the question whether this equalization should be carried out centrally by an increase in federal revenues and federal subsidies to the poorer *Länder*, or whether the *Länder* themselves should channel some of their revenues from the richer to the poorer states.[20] It would also involve a decision on how far the functional division and that of the expenditures connected with these functions should correspond to the division of tax revenues between the two levels of government.[21] A further problem was raised by the possible developments within the respective governmental functions and changes in the amount of revenue from certain taxes.[22]

When the Federal Republic was formed in 1949, the liabilities relating to the effects of the war and the currency reform of 1948 inflated the federal budget far beyond what the Federation might normally need, and previous experiences[23] indicated that great care had to be taken to insure a clear and stable division of fiscal powers between the federal government and the *Länder*. The Herrenchiemsee Draft of the Basic Law, therefore, included two alternatives, both based on the principle of "separation in kind."[24] It proposed either to give the income, corporation, and turnover taxes to the Federation and allow the *Länder* to levy an additional income and corporation tax, or to give these three largest taxes to the *Länder* and authorize the federal government to claim a share of the turnover tax.[25] The Parliamentary Council in Bonn finally agreed to a version which stated in general terms that the division of tax revenues should go along functional lines, with the *Länder* having "a legal claim on the

[18] 1. Deutscher Bundestag, Drucksache 3769, 3950, 3985, 4026, and *ibid.*, Verhandlungen, 248. Sitzung (Jan. 29, 1953), 11807–8 and 250. Sitzung (Feb., 25, 1953), 11944. Also Bundesgesetzblatt, I (Dec. 25, 1954) 517.

[19] 2. Deutscher Bundestag, Drucksache 480, Anlage A, pp. 78–80, 83–91. (Hereafter referred to as Drucksache 480).

[20] *Ibid.*, 102–3.

[21] *Ibid.*, 43–54.

[22] Drucksache 480, 16.

[23] The Weimar Republic had faced a similar problem after the inflation of 1923–24 and tried to meet the challenge in a series of unsuccessful attempts at financial reform during the year 1925.

[24] During the Weimar period this system of granting different taxes to each level of government was abandoned completely. The federal tax administration collected all the taxes and divided the total revenue according to an often-revised percentage system. Drucksache 480, 22–6.

[25] Art. 122 (a) and (b), Documents on the Creation of the German Federal Constitution, OMGUS, Civil Administration Division (Berlin: 1949), p. 75. (Hereafter referred to as Documents).

allocation of certain federal taxes or a share in them . . ."[26] A provisional division was to be established by law and remain in force until the time of a final constitutional settlement not later than December 31, 1955.[27]

At this point the Military Governors intervened with a Memorandum of March 2, 1949 and, in subsequent negotiations, made certain that there would be no consolidated federal tax administration and that the financial autonomy of the *Länder* was secured.[28] The result of these negotiations was embodied in article 106 of the Basic Law:[29]

(1) Customs, the yield of monopolies, the excise taxes with the exception of the beer tax, the transportation tax, the turnover tax, and levies on property serving non-recurrent purposes accrue to the Federation.

(2) The beer tax, the taxes on transactions with the exception of the transportation tax and turnover tax, the income and corporation taxes, the property tax, the inheritance tax, the taxes on real estate and on businesses (*Realsteuern*), and the taxes with localized application accrue to the *Länder* and, in accordance with provisions of *Land* legislation, to the *Gemeinden* (communities).

(3) The Federation may, by means of a federal law requiring *Bundesrat* approval, claim a part of the income and corporation taxes to cover its expenditures not covered by other revenues, in particular to cover grants which are to be made to *Länder* to meet expenditures in the fields of education, public health, and welfare.

In addition to this, the federal government, with the consent of the *Bundesrat*, could also claim a share of other *Länder* taxes for direct payments to the poorer *Länder*.[30] To complicate matters further, article 105 accorded the Federation concurrent[31] legislative jurisdiction over all important *Länder* taxes, again with the requirement of *Bundesrat* consent.[32] The administration of the various taxes, on the other hand, is to be exercised by the recipient of the respective taxes.[33]

In its application, this system at first proved inadequate to meet the increased needs of the Federation, which since April 1, 1950, had assumed the responsibility for (a) payments arising from the effects of the war (including the occupation costs), (b) social welfare,[34] (c) the maintenance of navigable

[26] *Ibid.*, 100.

[27] Von Doemming et al., *op. cit.*, 762–89.

[28] Documents, 108–10.

[29] *Ibid.*, p. 20.

[30] Art. 106 (4), *loc. cit. Supra*, n. 4.

[31] Under concurrent jurisdiction, "federal law overrides *Land* law." Some provisions of the Basic Law, however, restrict federal action in this field to matters (a) for which regulation by *Land* law would be inadequate, (b) in which regulation by one *Land* could prejudice the interests of other *Länder* or the nation and (c) where the preservation of legal and economic unity and the uniformity of living standards required it. The effect of this limitation is rather doubtful. Art. 31, 72 (2) and 105 (3), Grundgesetz, 24, 35.

[32] If the Federation were to use all its legislative powers, exclusive, concurrent and general, only the legislation pertaining to local government, police, education, cultural and religious affairs, and to some extent the *Länder* civil service would be left to the state legislatures.

[33] Art. 108, Grundgesetz, 36–7.

[34] Art. 120, *ibid.*, 39.

streams, the *Autobahn* and other federal long distance highways, and (d) its new administration of finances.[35] In order to encourage the *Länder* to administer federal funds with greater economy, it was decided to let them share 10 to 25% of the expenditures for the effects of the war and social welfare for the fiscal year 1950, rather than to claim a share of their income and corporation taxes.[36] For the federal budget of 1951, however, the federal government had to use article 106 (3) and claim 27% of these two *Länder* taxes. The rising needs of the federal treasury increased this percentage to 37% for the next two years, and 38% for 1953–54 and 1954–55[37], which annually led to bitter struggles and the regular use of the conference committee to achieve a compromise between the Cabinet and the *Bundestag* on the one hand, and the *Bundesrat* and the *Länder* cabinets on the other.[38] In this fashion the actual development of fiscal relationships seemed to make the income and corporation taxes a common source of revenue. The equalization of financial burdens among the *Länder* was likewise regulated on a year-to-year basis[39] and became the inevitable companion of every new settlement of the federal share of the tax on individual and corporate incomes. These annual struggles did not fail to subject intergovernmental relations to a severe strain[40] and created an atmosphere of mutual distrust to which the policies of the Federal Minister of Finance Schaeffer also seem to have contributed.[41] It would appear that these conflicts strengthened German federalism by leading to an entrenchment of vested interests on both sides[42] and by creating more federalistic sentiment through the bitterness of the struggle.

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[35] Art. 87 (1), 89 and 90, *ibid.*, 30–1. See also Bundesgesetzblatt. (Nov. 28, 1950), 773 and *ibid.*, I (Aug. 21, 1951) 774.

[36] Drucksache 480, 31. It should be noted in this connection that the Basic Law vests all administration of federal laws, with few exceptions, in the *Länder* administrations. Art. 83–6, Grundgesetz, 29–31.

[37] Wirtschaftskunde der Bundesrepublik Deutschland, Statistisches Bundesamt Wiesbaden (Stuttgart-Köln: Kohlhammer, 1955) 459.

[38] For 1952, for example, the Cabinet had requested 40%, while the *Bundesrat* was prepared to grant only 27%, as in 1951. Finally the *Bundesrat* settled for 37% only after the Cabinet guaranteed to each *Land* 105% of its 1951 revenue, which in practice (especially through large payments to Hamburg) reduced the federal share to 35.5%. Drucksache 480, 32. See also 1. Deutscher Bundestag, Drucksache 3168.

[39] This equalization was carried out in 1950, 1951–52 and 1953–54.

[40] R. W., "Streit um die Bundestreue," 9 Deutsche Zeitung, (no. 30, Apr. 14, 1954) 1, col. 3.

[41] *Bundestag* Deputy Guelich (SPD) read a remarkable list of the grievances of the *Länder* against Dr. Schaeffer to the *Bundestag*. It included "his annual underestimation of the tax revenue to be expected," his "exaggerated claims to a share of the income and corporation taxes" for the Federation, his "hoarding budgetary policy" which enabled him to finance the extraordinary budget out of the ordinary revenue, and his policy of direct negotiations with the *Länder* ministries of finance instead of submitting his plans to the legislative process. 2. Deutscher Bundestag, Verhandlungen, 120. Sitzung (Dec. 15, 1955) 6377.

[42] M. W., "Hohe Klippen der Finanzreform," 9 Deutsche Zeitung (no. 29, Apr. 10, 1954) 6, col. 2–3.

The Struggle over the New Finanzverfassung

The annual struggles between Cabinet and *Bundesrat* over the size of the federal share of the income and corporation taxes were only the prelude to the negotiations connected with the twice-delayed revision of article 106. On April 9, 1954, the *Bundesrat* considered three bills submitted by the Cabinet:[43]

(1) A Law to Alter and Complete the Financial Constitution (*Finanzverfassung*) which was to replace the division of tax revenues embodied in article 106 of the Basic Law.

(2) A Law to Adjust the Financial Relations Between the Federation and the *Länder* to this Financial Constitution.

(3) A Law Concerning the Equalization of Financial Burdens Among the *Länder*.

The first of these bills, the *Finanzverfassung*, was first mentioned by Dr. Schaeffer in conjunction with an extensive tax reform before the *Bundestag*.[44] Behind the three bills stood the work of a study commission of financial experts appointed by the Federal Minister of Finance.[45]

Among other provisions the replacement for article 106 proposed to add the automotive tax to the *Länder* revenues, while the Federation was to levy an additional tax on individual and corporate incomes for which the consent of the *Bundesrat* would not be required.[46] The *Länder* income and corporation taxes were not to be called "common taxes," and the Federation would receive a share of 40% which could be revised whenever the budgets of the *Länder*, or the Federation should require it.[47]

The *Bundesrat* turned down this proposal and offered a counterplan which listed the income and corporation taxes again as *Länder* taxes and granted the Federation a share of only 35%. The "additional levy," restricted to 10% of the income and corporation taxes, turned up again as a source to be used by both levels of government and, of course, only with the consent of the *Bundesrat*. In place of the revision clause, a further provision was to secure the *Länder* against having to assume any new functions without corresponding new financial resources.[48]

[43] For the text, see Drucksache 480, Anlage I, II and III, at 2–3, 4–7 and 8–12, respectively.

[44] At that time the tax reform and the *Finanzverfassung* were considered inseparable on account of the effect of tax reductions on the adequacy of the distribution of revenues between both levels of government. See 2. Deutscher Bundestag, Verhandlungen, 29. Sitzung (May 20. 1954) 1316. Later on the protracted conflict over the *Finanzverfassung* separated them again.

[45] The report of this commission was added as Anlage A to Drucksache 480. In shedding light on the financial structure underlying German federalism it is second only to J. Popitz, Der Finanzausgleich und seine Bedeutung für das Reich, die Länder und die Gemeinden, (Berlin: RDI, 1930).

[46] Drucksache 480, Anlage I, 2, art. 106 (a), (b) and (c).

[47] *Ibid.*, art. 106 (e). For the revenue derived from the principal taxes, see The Federal Republic of Germany, Overseas Economic Surveys, United Kingdom, High Commission in Bonn, Board of Trade (Bonn: March, 1955), appendix II, p. 341.

[48] Drucksache 480, Anlage B, 196.

Throughout the following two years, the *Finanzverfassung* went through eight different versions in the struggle between Cabinet and *Bundestag* on the one hand and the *Bundesrat* and the *Länder* on the other. At the instigation of the Cabinet, the *Bundestag* at one time proposed to take several small taxes away from the *Länder* and give them to the Federation.[49] The conference committee agreed to this solution, but the *Bundesrat* promptly turned it down.[50] The federal additional levy on individual and corporate incomes was finally incorporated into the new article 106. The *Bundesrat* had failed in spite of repeated attempts to restrict this additional levy to 5 or 10% of the regular income and corporation taxes which it controls, or to find other ways of subjecting it to its veto.[51] The question whether these taxes were to be called "common" or *Länder* taxes was decided by avoiding any label. Future interpretations will probably tend to regard them as common taxes. The federal share of these taxes was reduced from the 38% received in 1954 and the 40% claimed in the original Cabinet bill to one third during the first three years after the new *Finanzverfassung* went into effect. After April 1, 1958 this percentage would automatically increase to 35% and be revisable every two years.[52] These periods constitute another compromise between the desire of the Cabinet for frequent revisions of the federal share of the income and corporation taxes and the tendency of the *Bundesrat* to distrust the outcome of frequent political struggles.

The *Bundestag* passed the *Finanzverfassung* four times and the conference committee passed it three times in various versions, while the *Bundesrat* rejected it three times and came up with three new drafts. On December 21, 1955, finally, the *Bundesrat* considered the last conference committee report and adopted it by 29 to 9 votes after some protest from Hesse and specific objections to the unlimited "additional levy" from North Rhine Westphalia.[53]

In its final form, the *Finanzverfassung*, as it went into effect by April 1, 1955, provided for the following division of revenues:[54]

(1) Subject only to the suspensive veto of the *Bundesrat*[55] and under the administrative jurisdiction of the Federation,[56] all revenue from the federal monopolies, customs, excise (ex-

[49] 2. Deutscher Bundestag, Verhandlungen, 29. Sitzung (May 20, 1954), 1314–71, and 57. Sitzung (Nov. 19, 1954); This proposal should probably be regarded as an attempt to insert bargaining points into the bill in anticipation of the resistance of the *Bundesrat*.

[50] 2. Deutscher Bundestag, Drucksache 1254, and Deutscher Bundesrat, Verhandlungen, 139. Sitzung (Apr. 1, 1955) 69–71, 75–6.

[51] The absolute veto of the *Bundesrat* is restricted to matters relating to the federal system and constitutional amendments. On all other laws its veto is only suspensive. Art. 84–5, 87, 37 and 91, 79, 105–7, 108, 134 and 135, Grundgesetz, 17, 27–31, 35–7, 42–3.

[52] 2.Deutscher Bundestag, Drucksache 1938, Anlage, and *ibid.*, Verhandlungen, 120.Sitzung (Dec. 15, 1955), 6376–7.

[53] Deutscher Bundesrat, Verhandlungen, 151.Sitzung (Dec. 21, 1955), 378–80.

[54] For the German text, see Bundesgesetzblatt, I (Dec. 28, 1955), 817, or Sammelblatt für Rechtsvorschriften des Bundes und der Länder, 1956, no. 1 (Jan. 5, 1956) 1–2.

[55] Art. 77 (2), (3) and (4), Grundgesetz, 27.

[56] The Federation can also choose to have some of its taxes collected by *Länder* authorities. Art. 108 (1), (2) and (4), Grundgesetz, 36–37.

cepting the beer tax), turnover and transportation taxes, nonrecurrent property levies, *Lastenausgleich* levies,[57] the Berlin aid tax, and the additional levy on individual and corporate incomes accrues to the Federation.

(2) Subject to the absolute veto of the *Bundesrat* and to be collected by *Länder* authorities, the proceeds from property, inheritance, automotive, transactions (with the exception of turnover and transportation taxes), beer, gambling, realty, and locally limited taxes accrue to the *Länder*.

(3) Of the revenue from income and corporation taxes, one third is to be the federal share until April 1, 1958, when it will become 35% and be open to revision every two years if the federal or the *Länder* budgets have become grossly unbalanced. If federally imposed burdens produce such unbalance in the *Länder* budgets, a revision can be requested at any time. The budgets of governmental units below the *Länder* are included in the provisions for the *Länder*. All such revisions are to be carried out on a basis of equality between the two levels of government in having their balances adjusted.

The Significance of the New Finanzverfassung for German Federalism

The importance of intergovernmental relations in the field of public finance for most federal systems is generally recognized today. In the history of our own federal system, the grants-in-aid program has been a vehicle of federal expansion into fields traditionally reserved to the states. Moreover, the fact that our states are rarely in a position today to refuse federal grants offered to them also indicates the degree of centralization prevailing in our federal system. With the exception of the West German Basic Law, however, no federal constitution ever contained such detailed provisions with respect to the division of revenues between the two levels of government and periodic adjustments of this division. The reason for this peculiarity of the Basic Law lies partly in its fundamental differences from our and most other federal systems: West German federalism is of the Federal Council (*Bundesrat*) type, i.e. its upper house consists of members or representatives of the *Länder* cabinets who vote by *Länder* delegation, and upon instructions from their governments. Their participation in the administrative functions of the Federation also exceeds by far the executive functions of the American Senate. The federal arrangement, furthermore, is based on a division of governmental powers which gives almost all legislative authority to the Federation[58] and leaves the bulk of the administrative powers in the hands of the *Länder*,[59] which administer the federal laws in addition to their own. Under these conditions the *Länder* might not be more than territorial administrative corporations, if they did not enjoy budgetary autonomy and independent, sufficient tax resources. German federalism, then, rests mainly on two pillars: the power and independence of the *Bundesrat* and the financial autonomy of the *Länder*.[60]

[57] The *Lastenausgleich* is a program of financial readjustment, aiming to redress the material losses of refugees and other persons who suffered damages through the war and postwar period, by taxing those who did not lose as much.

[58] *Supra*, note 32.

[59] Only the foreign service, the federal tax administration, federal communications, border protection, and social insurance are federally administered.

[60] It should be noted in this connection that the composition and the powers of the *Bundesrat* and the financial relationship between Federation and *Länder* were also the main

The other reason for this peculiarity of the Basic Law lies in the fact that, while most other federal systems could develop their financial relations during a relatively long and undisturbed history, German federalism has been subjected to one severe crisis and abrupt change after another. To cope with the implications of this cataclysmic history for federalism, German financial experts developed the procedure of the "financial adjustment" (*Finanzausgleich*) between the two levels of government.[61] In 1949 the Allies sought in vain to impose the grants-in-aid system upon the framers of the Basic Law who preferred the tried method of the "financial adjustment."[62] The *Finanzverfassung*, which now became the new article 106,[63] includes both the division of revenues and the financial adjustment of this division and incorporated them into the Basic Law. Its adoption, moreover, demonstrated the successful defense of the financial autonomy of the *Länder* as well as the power and independence of the *Bundesrat*, which succeeded in retaining essentially the division of revenues imposed by the occupying powers in 1949.

If we compare the new *Finanzverfassung* with the old article 106 of 1949[64] we find that the Federation gained the *Lastenausgleich*[65] levies which are only a temporary phenomenon and, moreover, were earmarked for a specific purpose. The Berlin aid tax, another federal gain, has perpetuated itself far beyond the time and circumstances which prompted it, but it is a small source of revenue and, like the *Lastenausgleich* taxes, it was never a *Länder* tax. The federal additional levy on individual and corporate incomes, however, has been opposed and restricted in all *Bundesrat* proposals for the *Finanzverfassung* with good reasons. It is perhaps the most important novelty of the new article 106, because theoretically a large *Bundestag* majority could at any time increase this additional levy to the point where the proportion between it and the taxes to which it is added would be reversed. The regular income and corporation taxes have already been brought to a minimum by several recent tax reductions and could be kept there even during an inflation, while the *Bundestag* could make the additional levy the real federal income tax. The *Bundesrat* could check such a development only by a suspensive veto which can be overridden

issues at the time of the drafting of the Basic Law and gave rise to its crisis in April 1949 when the Social Democratic delegation walked out of the Parliamentary Council in Bonn.

[61] Deutscher Bundesrat, Verhandlungen, 121.Sitzung (Apr. 9, 1954) 79.

[62] The framers regarded the grants as federal gifts implying the financial dependence of the *Länder* (*Dotationswirtschaft*). 5 Neue Zeitung, (no. 30, March 12, 1949) 2, col. 4–5.

[63] The *Finanzverfassung* was not a constitutional amendment in the ordinary sense requiring two-thirds majorities in both houses, although such majorities were obtained without effort. It was passed like an ordinary law requiring the consent of the *Bundesrat*, but received the status of a constitutional provision by virtue of the express instruction contained in the old article 107 to make such a law in substitution for the previous division of revenues of article 106. Article 107 was replaced by the provisions governing the equalization of financial burdens among the *Länder*. 2.Deutscher Bundestag, Drucksache 1819.

[64] *Supra*, p. 331.

[65] *Supra*, note 57.

by a corresponding majority in the *Bundestag*. Its absolute veto over income and corporation taxes only gives it the power to prevent changes, not to promote them. In its long-run effect, therefore, the additional levy will be the most available entrance for federal expansion and centralization, especially in times of crisis. There is a possibility, however, that post-Adenauer coalitions may not be able to rally overriding majorities in the *Bundestag*, in which case the suspensive veto of the *Bundesrat* might become an unexpectedly powerful weapon.[66]

The *Länder* also gained something in the final settlement, the proceeds from the gambling and automotive taxes. On the whole, neither level of government took over anything very significant from the other. Since the *Bundesrat* stood its ground, the objects of the struggle remained confined to the distribution of new taxes and finding a procedure for the division of the income and corporation taxes. It is difficult to say whether these latter taxes are still *Länder* taxes in principle, since the last two conference committee drafts evaded this issue. The constitutional specification of the federal share and the clauses governing its revision are probably a gain for the *Länder*, since the old article 106 provided no restrictions on the federal claim to a share of the income and corporation taxes at all. At the present rates these taxes constitute only some 20% of the federal budget, while they figure as 70% and more in the budgets of the *Länder*.[67] For this reason the *Länder* greatly depend on this revenue and the federal share of one third and 35% are also a gain as compared to the 37 and 38% of the years preceding 1955. Apparently the *Länder* had suffered more from the annual tug of war over the income and corporation taxes than the Federation, because the *Bundesrat* seemed most anxious to terminate the struggle at the earliest possible date. There had also been complaints that the federal government had a tendency to balance its own deficit from the *Länder* income and corporation taxes, while the *Länder* were referred to the credit agencies with the result that they are deeper "in the red" today than ever before.[68] In this connection the assurance of equality between the two levels of government in having their balances adjusted is also a great gain for the *Länder*, which had been put at a disadvantage by a provision of the Basic Law requiring the federal budget to be balanced.[69]

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[66] Such a situation has prevailed in France where the slim majorities in the Assembly have rendered the suspensive veto of the Council of the Republic far more powerful than the framers of the French constitution intended.

[67] In 1954, for instance, the federal tax revenues other than the income and corporation taxes amounted to approximately 20 billion marks as compared to 2.1 billion for the *Länder* taxes (not counting the income and corporation taxes) which had turned out to be considerably less sensitive to the economic boom than the federal taxes. As the 1954 federal share of 38% of the income and corporation taxes, the Federation took in 4.7 billion while the *Länder* received 9.7 billion. Deutscher Bundesrat, 150.Sitzung (Dec. 2, 1955) 350–2.

[68] *Ibid.*, 352.

[69] Art. 110 (2), Grundgesetz, 37.

On the whole, the *Bundesrat* seems to have taken this final battle rather well. It ignored the bargaining points inserted in the *Bundestag* proposal of November 19, 1954,[70] and the conference committee draft of March 11, 1955.[71] It stoically refused its consent, furthermore, to one draft after another even in the face of public criticism, attacks in the press,[72] and pressure from various interest groups.[73] It had the courage to reject the second conference committee report on December 2, 1955, which was the session next to the last in 1955, the deadline for the *Finanzverfassung* being December 31, 1955. At this meeting, moreover, the *Bundesrat* itself used the pressure of time against the *Bundestag* and forced it into accepting a lower federal share for the first three years, after it had already been assumed that the *Bundesrat* would be content with a federal share of 35%.[74]

During the year of the *Finanzverfassung*, 1955, minor collisions between *Bundestag* and *Bundesrat* were not seldom. Straeter (North Rhine Westphalia) pointed out before the *Bundesrat* that it had few friends in the *Bundestag* and was often criticized on its floor with phrases like: "The *Bundesrat* again did not bother to find out the facts," or "there is no debate in the *Bundesrat*. All proposals are simply being rejected." Comments like "the power and the claims to power of the *Bundesrat* have increased constantly," "the *Bundesrat* is the would-be (möchte-gern) competitor of the *Bundestag*," and its work, the "federalism of the bureaucrats" have always found general applause.[75] Perhaps this heckling is a hidden compliment to the power and prestige of the *Bundesrat*, which to wide circles of the German population and in particular to the man in the street is virtually unknown, as far as its functions and even its existence are concerned.[76]

A conspicuous feature of the new *Finanzverfassung* is also the absence of provisions assuring the local units of government of some measure of financial

[70] 2.Deutscher Bundestag, Verhandlungen, 57.Sitzung (Nov. 19, 1954).

[71] 2.Deutscher Bundestag, Drucksache 1254.

[72] For instance, M. W., "Hohe Klippen der Finanzreform," 9 Deutsche Zeitung (no. 29, Apr. 10, 1954) 6, col. 2-3. Also M. W., "Chancen der Finanzreform," *ibid.*, (no. 99, Dec. 11, 1954) 6, col. 2-3.

[73] For the aims of business, see Unternehmerforderungen an eine neue Wirtschafts- und Finanzverfassung, (Köln: Otto Schmidt KG, 1954); also Deutscher Industrie- und Handelstag, Feste Währung—Gesunde Wirtschaft. Tätigkeitsbericht 1956/57, pp. 186-7 and Karl M. Hettlage, "Das Trauerspiel der Finanzreform," Frankfurter Allgemeine, (no. 88, Apr. 16, 1955) 5. Labor agreed with business on their joint opposition to the "additional levy" on individual and corporate incomes. Geschäftsbericht des Bundesvorstandes des Deutschen Gewerkschaftsbundes, 1954-55, (Düsseldorf: DGB, 1955), p. 424. Artisans' organizations seemed to accept it. Deutscher Handwerkskammertag, Jahresbericht, 1. April 1955 bis 31.März 1956, p. 193.

[74] The difference between one third and 35% for three years will be about half a billion marks, or 5% of all the *Länder* budgets in 1954.

[75] Deutscher Bundesrat, Verhandlungen, 137.Sitzung (March 4, 1955), 42.

[76] A public opinion poll of the *Institut für Demoskopie* recorded 92% of its respondents as not knowing what the *Bundesrat* is. Quoted by Colloquium, 9 Zeitschrift der Freien Studenten Berlins (no. 12, Dec., 1955) p. 6.

autonomy.[77] It is characteristic of Bavaria, the self-appointed guardian of the federal system in Germany, that it never thought of introducing federalism within its own borders but has been strictly unitary throughout the nineteenth and twentieth centuries. When the *Finanzverfassung* first came before the *Bundesrat*, the delegation of Schleswig-Holstein proposed an amendment giving the communities (*Gemeinden*) the taxes on real estate and businesses. This the *Bundesrat* rejected without hesitation.[78] National newspapers conducted a campaign during the first year,[79] supported by communal associations, the Federal Ministry of the Interior, and conservative parties like the German Party,[80] in an attempt to wrest the financial sources of local government from the *Länder* ministries of finance.[81] These efforts to strengthen German democracy at the grass roots were of no avail, because German local government lacks a formal basis of participation in national legislation comparable to the *Bundesrat* as an agent of *Länder* interests.[82]

Considering that in 1949 the economic developments and the increase in foreign trade could hardly be anticipated, it is rather surprising to find that the new division of revenues, with the possible exception of the still undeveloped "additional levy," is not much different from the provisional arrangement made almost seven years ago under the pressure of the occupation authorities. The

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[77] Introducing the annual budget, Dr. Schäffer drew a revealing parallel between the division of all tax revenues collected in the *Reich* before 1914 and the present division: While the federal share of the total revenues increased from 33% to 57%, the share of the *Länder* dropped from 28% to 23%, and that of the communities from 39% to 20%. This seems to demonstrate that the real losers in the process of governmental centralization were the communities rather than the *Länder*.

[78] M. W., "Die Stiefkinder des Bundes," 9 Deutsche Zeitung (no. 42, May 26, 1954) 4, col. 1–3.

[79] See R. Heim, "Verbundene Steuerwirtschaft," *ibid.* (no. 24, March 24, 1954) 4, col. 1–3; H. C., "Vom Bürger ist keine Rede," *ibid.*, (no. 32, Apr. 21, 1954) 3, col. 1–2; Wn., "Das Spiel mit Millionen," *ibid.* (no. 94, Nov. 24, 1954) 2, col. 1–2; Wn, "Im Sieg des Bundes," *ibid.*, (no. 103, Dec. 24, 1954) 5, col. 2–4; and M. W., "Ein Vorstoss zugunsten der Gemeinden," *ibid.*, (no. 103) 6, col. 2–3.

[80] For the requests of communal associations, see Deutscher Städtetag, Geschäftsbericht 1952/1953, 43–6. For their negotiations with the *Bundesrat*, and Federal Ministry of the Interior, see Geschäftsbericht 1953/1954, 23–5, and Geschäftsbericht 1954/1955, 32–4.

[81] The reasons given for the retention of the bulk of local finances in the *Länder* budgets were all too reminiscent of similar arguments on behalf of the Federation, such as the need for equalization among the local units. When the Federation used these arguments, however, the *Länder* never accepted them as valid.

[82] After the *Finanzverfassung* was adopted, the communal associations prevailed upon the *Bundestag* to endorse a constitutional amendment to the new article 106 on which the ink had hardly dried. They obtained the endorsement of all political parties in the *Bundestag* and the amendment was passed by this house by 384 to 8 votes and 3 abstentions on March 8, 1956. The amendment sought to secure the communities in the same manner against the *Länder* as the *Bundesrat* had secured the *Länder* against the Federation: By a guarantee of independent tax resources and the "assurance" (*supra*, p. 335) that no burdens could be imposed upon their administrations without giving them adequate financial resources for this purpose. Deutscher Städtetag, Geschäftsbericht 1955/1956, 42–3.

federalism of the Weimar Republic was emaciated with one stroke by the 1919 financial reform of Matthias Erzberger. The federalism of the Basic Law, however, was widely assumed to be the artificial creation of the Western Allies, especially the French who meant to keep their overbearing neighbor weak by "constitutional engineering." The postponement of the final settlement of the vertical distribution of tax revenues under these circumstances appeared to be a carefully planned setting for another Erzberger reform. Because of the peculiar structure of German federalism a drastic change of the financial relationship between Federation and *Länder* would have resulted in the *de facto* collapse of the new German federalism. As we have seen, the tenacity of the *Bundesrat*, the one pillar of German federalism, in its defense of *Länder* interests kept the other pillar, the financial autonomy of the *Länder*, so well intact that there is no reason today to doubt that federalism in Germany is here to stay.[83]

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[83] Why German federalism turned out to be considerably stronger than constitutional experts predicted, cannot be explained in a few words. But among the reasons we are likely to find the following: (1) A general underestimation of the power of the *Bundesrat*, (2) the overestimation of the artificial character of most of the *Länder*, (3) the absence of economic strains such as those once fatal to Weimar federalism, (4) the lasting imprint of the reaction to Nazi centralism, and (5) the subtle changes in the attitude toward federalism of some political parties, especially the Social Democrats.

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THE CONSTITUTIONAL PROBLEM OF THE ARGENTINE REPUBLIC

It is known that Argentina is committed to a revision of its fundamental charter, but it is not known when it will occur, by what means, and, above all, whether it should be accomplished by a "de facto" government, such as that which rules the destiny of the country at present. It is believed that the main purpose of the revision may be to purify the constitution of the amendments introduced by the Perón regime in 1949. This brief comment attempts to analyze the nature of what appears to be the most basic and crucial problem of Argentine constitutional law at this moment.

Even prior to 1943, the year of the revolution which swept Juan Domingo Perón into the Argentine presidency, the necessity of revising the constitution, in effect since 1853, had been felt. In 1930 a "de facto" government sponsored amendments, basing its action on abundant authority in both learned writers and parliamentary debates. The scope of the constitutional revision, e.g., what should be amended, has not changed; but the exigencies of the revision have become more acute and recognizable due to the experiences suffered by the country during the Perón regime.

What is controversial, what has been and is still being debated, is the *time* and *procedure* for carrying out the revision. The amendment process is clearly delineated in the Constitution of 1853, and is varied only slightly in the Perón

constitution of 1949.[1] While the procedure is written in black and white, the time, on the other hand, is a matter of political expediency which, in part, depends on the decision of the Congress. According to constitutional norms, the Congress is the sole body endowed with the power to enact the bill calling for the reform of the constitution. If such a bill is approved, then an *ad hoc* constitutional assembly, separately elected for the very purpose of considering the reform, decides whether or not the modification of the constitution is necessary, and if it so finds, then carries out the revision.

The present government, however, seeks to accomplish the change by substituting a "de facto" executive for the Congress in declaring the necessity for revision of the constitution. This itself is a breach of the constitution and as such is nullified by its obvious illegality. The revolutionary government which, to the relief of the nation, deposed the Perón dictatorship in September of 1955, ruled the country under the Constitution of 1949 until May 1st, 1956. On this date, by means of a proclamation declared in the city of Concepción del Uruguay,[2] the government sought to nullify the Peronist amendments of 1949 and stated that the Constitution of 1853 would be in effect insofar as it did not interfere with the objects of the revolution which brought this same government into power.

To those of us trained in the normal juridical principles of government, principles which are a common bond between Argentina and the United States, two leading questions emerge: (1) How can the partial nullification of a constitution in force for more than six years be declared by the executive organ of a "de facto" government and, furthermore, by means of a decree-law? (2) How can anything of the older constitution of 1853 undermine the principles, or be in conflict with the objectives of the revolutionary government, which, by its announced purpose, is committed to returning the nation to the path of democracy and liberty as delineated in that very same constitution?

In support of the present government's theory, not easy for truly orthodox jurists to admit, there are professors and lawyers in Argentina who attempt to justify the solution chosen by the government to resolve the arduous problem of the invalidity of the constitutional reforms of 1949. They argue that the revolutionary government cannot be handicapped by obstacles of a constitutional or legal character. They hold the "rights of the revolution" superior to

[1] Art. 30 of the Constitution of 1853 provides: "The constitution may be amended as a whole or in any of the parts thereof. The necessity for amendment must be declared by the Congress with the approval of two thirds of its members; but an amendment of the constitution can only be effected by a Convention called for that purpose." The Constitution of 1949 added the word "present" after the phrase "with the approval of two thirds of its members." The Peronist regime maintained that this, in fact, was meant by the framers of the original constitution. The political repercussions of this change, greatly reducing the number of votes previously needed to amend the constitution, are too well known to be discussed.

[2] In this Argentine city, on the western banks of the Uruguay River, a similar proclamation was read on May 1st, 1851, which committed the nation to the removal of the dictatorship of Juan Manuel Rosas, which was successfully carried out at the battle of Monte Caseros barely a year later.

the law of the constitution and place the "objects of the revolution" above the objects of the constitution. This author personally denies the pre-eminence of the rights of the revolution and holds to the fundamental principle of the supremacy of the constitution.[3]

Furthermore, the power to decide whether or not an amendment to the constitution has been legally enacted lies in the judicial branch of the government, not the executive, and a fortiori if the executive power is "de facto," as is the present case in Argentina. It is generally recognized in our countries that "de facto" governments can at times exercise legislative powers, with certain limitations and under the stress of a national emergency, by decrees. But it is clear that even a national emergency will not allow a "de facto" executive to assume judical powers.

Article 95 of the Constitution of 1853, an article essential to the form of democracy which recognizes the fundamental necessity of the separation of powers, and therefore, understandably not included in the Peronist revision, states: "In no case can the President of the Nation exercise judicial functions. . ." The initial words, "in no case," clearly admit no differentiation between "de facto" governments and elected governments, and least of all revolutionary governments.

If the Proclamation of Concepción del Uruguay states that the Peronist amendments of 1949 are null, and that the Constitution of 1853 is the basic charter of the nation, it is inadmissible that Article 95 of the Constitution of 1853 be violated under the pretext of observing the objectives of the Revolution of 1955.

Nor can the executive power replace the legislature, as a body of popular representation, in an act of political character, as is stated in Article 30 of the Constitution of 1853 and even repeated in Article 21 of the Peronist charter of 1949. As a body representing the public, the Congress has this exclusive and nondelegable power.[4]

If, in the course of a normal regime of an elected government, the Congress cannot delegate this power, how, then, can a "de facto" executive unilaterally assume such a power? Popular as the revolutionary government may be with the Argentine public, it nevertheless lacks the representative character which is conferred only by election. It is evident that the present government does have the support of the people, but it cannot, on the basis of mere popularity, replace the Congress in questions of constitutional reform. Such an act, unconstitutional per se, is also incompatible with the philosophy of our democratic principles.

If it be argued that the present administration based its nullification of the Perón amendments strictly on the fact that the amendments were passed by

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[3] See Art. 31, National Constitution of 1853 and Article 22 of the Constitution of 1949 and legislation adopted under the authority thereof.

[4] See also, Article 29: "The Congress cannot concede to the Executive . . . extraordinary powers, nor the sum of public powers . . . Acts of this nature will result in the nullification of such acts and will subject the authors . . . to liability and punishment . . . for treason."

two thirds of the members "present" in Congress, and not by two thirds of the Congress, even less then can we condone such action taken by the government, since this recognizes the necessity of respecting the constitution and then usurps the constitution by acting instead of Congress in the matter. It is a dangerous precedent to allow a "de facto" executive to exercise judicial powers on questions of the legality of constitutional amendments. This leaves the door open for similar action by future governments and, if it be permitted that "de facto" governments should so act, it then follows that elected governments may also take such steps. It is lamentable that the fruits of the revolution which overthrew the tyranny should remain in the arbitrary power of a "de facto" government.

The stand taken by this writer on the subject is now well known throughout the Argentine Republic, holding that the only power capable of nullifying a law, or an amendment to the constitution, is the judicial. If it be found that the amendments of 1949 are defective because of the procedure employed to pass them, then the Supreme Court should so decide, as provided by Article 100, in a trial case submitted for this very purpose.

In our legal system, it cannot be argued that the Supreme Court lacks authority to decide these points by reason of the subject matter, as has been the case in the United States in similar, but not identical cases. The doctrine of judicial nonintervention in political questions as applied in the United States is based on the fact that the jurisdiction in question pertains to another power.[5] The Argentine question, while it does involve a political question, is essentially a problem of judging the legality of the procedure employed to amend the constitution in 1949. In the case at hand, there is no question of any judicial invasion of the provisions of the Article 30 of the Constitution of 1853, but simply a question of judging whether or not this article was respected in the process of the revision of 1949. The procedure does not depend upon the judgment of the Congress, even less upon the judgment of the executive power; it is expressly stated in the article cited and is a condition *sine qua non* to the validity of any constitutional amendment.

Therefore, as can be plainly seen, an adjudication by the Supreme Court on the procedure used in 1949 to amend the constitution would not be an infringement by the court on the powers of the legislature or of the executive. Article 100 of the Constitution of 1853[6] provides specifically that: "Recognition and decision of all matters ruled by the constitution pertain to the Supreme Court. . ." On the other hand, any pronouncement by either the executive or legislative powers on a matter such as the one in question is a definite and deliberate invasion of the exclusive powers of the Supreme Court.

Basically, the question is whether or not the procedure used to amend the Constitution of 1949 was constitutional. According to American and Argentine jurisprudence, this is strictly a judicial and not a political question. This procedure is expressed in Article 30 of the constitution; the power to decide upon it

[5] Colegrove v. Green, 328 U. S. 549 (1946).

[6] Article 95 of the Constitution of 1949.

is granted to the Supreme Court by Article 100 and specifically denied the executive by Article 95.

It has been pointed out, pessimistically but not erroneously, that the process of testing the constitutionality of the amendments of 1949 by a series of challenging adjudications before the Court could affect only those parts of the constitution in question. However, after several such trials, the constitution would remain purified of the profanities of 1949. It is true that this would be a lengthy process, but Argentina must remember a modern Latin-American adage that one must have patience with the law, for time takes revenge on what is done without its collaboration.

It will also be pointed out that such a process may not lead to a final disposition of Article 78 of the Peronist constitution which, contrary to the Constitution of 1853, permits a president to be re-elected and which, it may be argued, was the target of the Proclamation of Concepción del Uruguay. We are told that this Proclamation erases the possibility of a return of the deposed dictator through the channels of a national election.

Apart from the fact that this writer does not believe that there exists even the slightest possibility of the ex-dictator's presenting his candidacy to attempt a legal return to the presidency, it is furthermore established that Sr. Perón is no more than a fugitive from justice for his myriad felonies and misdemeanors committed while he held the presidency and therefore unquestionably ineligible as a candidate. Such being the case, the urgency of an arbitrary nullification of a part of the constitution by the executive power, i.e., by the Proclamation of Concepción del Uruguay, cannot be supported by the above contention.

To the juridical reasons, furthermore, one could add others, metajuridical, or political, to eliminate the possibility of such a candidacy. This would be less controversial than the step taken by the present regime, as likewise would have been a simple declaration of inapplicability of Article 78, in view of the extraordinary circumstances surrounding the personality of the only person to whom the article permitting re-election could apply!

On the other hand, the annullment of dispositions which present no menace to the nation is per se contrary to the restoration of justice and constitutional normality, the primordial motive of the revolution. Even if the Proclamation of Concepción del Uruguay could be justified in law, what cannot be justified in the light of every juridical principle, nor even in respect of the motives of its well-intentioned authors, is the accompanying doctrine which subordinates the Constitution to the "objectives of the Revolution."

The Revolution of September, 1955, has, unquestionably, certain sacrosanct rights for having liberated the nation from the dictatorship, but even those rights cannot permit sacrilege of the Constitution. The Revolution requires no semasiological study; it was honorably inspired by the principles of restoration of democratic institutions in Argentina; its objective was the re-establishment of the Constitution and to observe it religiously, even though the "de facto" government did not swear any textual oath to that effect. The dominance of the fundamental law of the country does not depend on any specific oath to which

the leaders may be subjected, but a violation of this fundamental law, even partial, brings about an elimination of constitutionality. In Latin America this is an uncontroverted, and frightening, truth! The objectives of the revolution having been declared, "revolutionary" as they may be, means at variance with the end cannot, of course, ever lead to that end. If the Pink House[7] is soiled after a decade of abuse, even the best intentioned decorator could not restore it with black paint.

The reader then inquires: What, then, are the means to the end? It has been shown that no other means to reform the constitution should be used than those indicated by Article 30, nor should a "de facto" executive declare the nullity of the constitution, even though it may be partial, this being an essentially juridical function. Nor can this action be justified on grounds of imperative necessity or imminent urgency; any procedure used to amend the Constitution other than that specified by the Constitution is a breach of the constitution and illegal per se.

In the opinion of this writer, the correct procedure would have been to convoke elections for representatives and senators as soon as the electoral rolls could have been purified so that, once Congress was in session, the executive could submit the project of amending the constitution in accordance with Article 30.[8] As may be observed, the danger presented by Article 78 would not be present in such case. At the same time, public opinion would have pronounced clearly on the points which need reformation, just as today the popular conclusions regarding the Proclamation of Concepción del Uruguay are also well known.

If the body of public representatives, thus elected, believed in the necessity of reforming the Constitution, as is inevitable, the ad hoc assembly could be called and the constitution amended. Then general presidential elections could be convoked, and the country again placed on the path of constitutional normalcy, with no pending problems as those of the moment.

Alberdi, in the first chapter of his immortal *Bases*[9] said: "Nations do not travel the road of suffering without benefit." To proceed, although in good faith and with best intentions, as those criticized have proceeded, would be to derive no benefit from the sad experience of our recent great national tragedy.

SALVADOR M. DANA MONTAÑO*

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[7] La Casa Rosada, seat of the Argentine presidency.

[8] Article 21 of the Constitution of 1949.

[9] Translator's note: "Bases," by the Argentine statesman and philosopher, Juan Bautista Alberdi, is often considered the source of the Argentine Constitution of 1853. See Henríquez Ureña, Literary Currents in Hispanic America (1945) 137.

* Dr. Salvador M. Dana Montaño, long-time Professor of Law at the University of the Litoral, Santa Fé, Argentina, and Federal Judge of the same district, delivered a series of lectures on "de facto" governments and the legalization of their legislative acts in Havana, under the auspices of the Inter-American Academy of Comparative and International Law, in February of 1957. This comment originated from a suggestion of Prof. David S. Stern, Member of the Board of Editors and Director of the Inter-American Law Program of the University of Miami. The translation has been prepared by the Inter-American Law Program of the University of Miami.

NEW LEGISLATION

VIETNAM: MINING LAW—The present mining law of Vietnam is based on a decree enacted by the French administration in 1912.[1] This decree is adapted from the French mining law and like the latter has abandoned the doctrine of the *droit domanial*, under which the state is the owner of all mineral deposits. Hence, private ownership in mines is recognized. There are, however, major differences between the law of France and that introduced in Indo-China and other French colonies. One major difference is that private initiative in the colonies is encouraged to a greater extent than in metropolitan France, where the existence and location of mineral deposits are better known than in the colonies. Further, the decree introduces a somewhat strange institution, not existing in metropolitan France, namely, the requirement of a personal authorization without which rights in the field of mining can neither be acquired nor held by private parties.

After the establishment of the State of Vietnam, the mining law previously existing was expressly declared applicable "for the time being," by an ordinance of the Chief of State of Vietnam, promulgated in 1952.[2] Both the French administration and the Government of Vietnam have issued permanent amendments and provisional modifications of the basic decree. There are altogether nearly 130 such issuances. Consequently, the mining law is no longer made of one mold, and much of the lucidity and coherence of the basic decree of 1912 has been lost. This deficiency was recognized by the Government of Vietnam, which established a commission charged with the drafting of a law to revise and consolidate the existing provisions.[3] A draft law has been prepared accordingly; but it is being revised and has not yet been enacted. The most important features of the law as it now exists may be described as follows:

1. *Quarries v. Mines.* A distinction must be made between quarries and mines. Quarries are excavations for obtaining turf, building materials, and materials for soil improvement and similar substances (with the exception, however, of nitrates and phosphates). Deposits of these materials are the property of the owner of the land, who, as he wishes, may quarry them and exclude others from their exploitation. Apart from certain rules to insure the safety of quarrying operations, the mining law is not concerned with quarries, and they will not be considered further in the present paper.

Installations to take from the ground any other mineral resources, including nitrates and phosphates as well as oil and natural gas, are called "mines." The law pertaining to them is discussed in the following.

2. *Hydrocarbons v. Other Minerals.* While the basic decree of 1912 established uniform rules for all minerals which can be mined, a subsequent decree introduced a number of special provisions for hydrocarbons, which term comprises oil, natural gas, peat, asphalts, slate, and bituminous grits. While certain dif-

[1] Decree of January 26, 1912, Recueil Général, Vol. II, page 18.

[2] Ordinance No. 3 of March 6, 1952; Journal Officiel du Viet-Nam, 1952, p. 320.

[3] Presidential Order of May 17, 1952; Journal Officiel du Viet-Nam, 1952, p. 735.

ferences have thus been created, the rules relating to minerals other than hydrocarbons and those applying to hydrocarbons have in common three basic institutions of the Vietnamese mining law, namely (a) the so-called personal authorization, (b) the exploration permit, and (c) the mining concession, the significance of which will presently be described. We shall first deal with the law on the mining of minerals other than hydrocarbons and then take up the special rules which apply to the latter.

3. *Minerals Other Than Hydrocarbons.* (a) *Personal Authorization.* No individual or corporation can explore or exploit deposits of these minerals, unless he has first obtained a personal authorization, which is an indispensable prerequisite for the acquisition and holding of exploration permits and mining concessions. The personal authorization is issued by the State Secretary who has jurisdiction over mining (at present the State Secretary for the National Economy) upon recommendation by the Director of Mines and after the Security Services have been heard. The State Secretary may refuse to grant the personal authorization without notifying the applicant of the reasons for the denial. Similarly, the authorization may be revoked at any time without indication of the reasons therefore. There is no recourse to the courts in the case of a denial or revocation. Thus, these acts are left entirely to administrative discretion.

Individuals may receive an authorization regardless of their nationality. Corporations must be organized either in Vietnam or in the French Union, and the management must be preponderantly in the hands of Vietnamese nationals or French nationals, subjects, or *protégés.*[4] The nationality of the stockholders is not, however, subject to restrictions. The duration of a personal authorization is five years; it is renewable from time to time.

(b) *Exploration Permit.* Any person or corporation holding a personal authorization may apply for an exploration permit by filing a declaration made to the local mining commissariat or chief of province. Where several applications for the same area and minerals are received, the first eligible applicant receives the exploration permit. Each permit covers an area of three square kilometers. The exploration permit gives its holder the exclusive right to explore the minerals in the area covered by the permit. The permit constitutes real property and can be sold or otherwise transferred to third parties who are holders of a personal authorization; but it cannot be mortgaged.

The principal obligation of the holder is the carrying out of exploration work in accordance with good mining techniques. Where the land affected is privately owned, the holder of the permit must compensate the owner before occupying any part of the area. The compensation is fixed by administrative action, but is subject to judicial review. The owner's consent to the occupation is not required except with respect to build-up or enclosed portions of the land. Publicly owned land may, subject to a few exceptions, be used without compensation.

[4] The privileged position of the French Union is still in effect.

(c) *Mining Concessions.* The exploitation of a deposit of minerals requires a mining concession (*concession minière*), which can be acquired or held only by the holder of a personal authorization. The mining concession covers an area of three square kilometers and gives the *concessionnaire* the exclusive right to exploit deposits in the area concerned. Like the exploration permit, the mining concession constitutes transferable real property. Unlike the permit, it is a permanent right and may be mortgaged.

Individuals may acquire or hold a mining concession only if they are nationals of Vietnam or nationals, subjects, or *protégés* of the French Union. With respect to the acquisition and holding of mining concessions, corporations are subject to no further nationality requirements than those prescribed for the issuance to them of personal authorizations; they must be organized in Vietnam or in the French Union, and their management must be predominantly Vietnamese or French.

Any holder of an exploration permit who has found deposits is entitled to receive the concession for the area covered by the permit if he meets the nationality requirement. A holder of an exploration permit who does not meet this requirement may sell his permit to a party qualified as to nationality. The concession is then issued to the purchaser of the permit. Concessions may also be awarded by public auction to the highest bidder. Such an auction may be held in a few cases, e.g. when the holder of the exploration permit does not exercise his right to receive the concession, when no valid exploration permit is outstanding, or when a concession has been forfeited.

The mining concession is a right separate and distinct from the ownership of the land affected. The *concessionnaire's* relationship and obligations to the landowners are similar to those of the holder of an exploration permit.[5]

4. *Hydrocarbons.* The rules relating to hydrocarbons differ from those for other minerals mainly in the following respects:

(a) The personal authorization is issued by the President (formerly by the High Commissioner).

(b) The exploration permit is renewable if the holder properly develops the field.

(c) The exploration permit covers ten square kilometers.

(d) Exploration must commence within one year after the issuance of the permit.

(e) As in the case of other minerals, the holder of an exploration permit for hydrocarbons is entitled to the issuance of a concession, but he must show that sufficient deposits are available and that he is technically qualified and financially able to exploit the field.

(f) The concession is not permanent, but expires after forty years.

The nationality requirements with respect to the mining of hydrocarbons are the same as those applying with regard to the mining of other minerals.

[5] It may be noted that goldwashing in water courses is free for anybody, subject to the consent of the owner when the water course is privately owned. However, in areas covered by mining concessions, goldwashing is prohibited.

In 1936–1937 the issuance of exploration permits and concessions was suspended and has not since been resumed.

5. *Reservations.* The State itself may engage in the mining of any minerals. Uranium, thorium, glucinium,[6] and helium[7] may be mined only by the State.

Further, the President (formerly the High Commissioner) may provisionally reserve to the State the exploration in such zones or with respect to such minerals as he may specify. In these zones, or with regard to these minerals, new concessions are issued to private parties only by the President (formerly the High Commissioner) according to his free discretion.[8] Reservations of this type have been declared from time to time. Finally, in the fall of 1954, such a provisional reservation was declared for the entire territory of Vietnam and with respect to all minerals.[9] This reservation is still in force.

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[6] Decree of April 5, 1946; Journal Officiel de la Fédération Indochinoise 1947, p. 1099.
[7] Ordinance of June 29, 1949; Journal Officiel de l'Indochine, 1949, p. 1769.
[8] Decree of July 28, 1938; Journal Officiel de l'Indochine Française, 1938, p. 3133.
[9] Decree of September 23, 1954; Journal Officiel du Viet-Nam, 1954, p. 2250.

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Digest of Foreign Law Cases

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American Foreign Law Association

Applewhaite v. The S. S. Sunprincess, 150 F. Supp. 827, U. S. D. C't. S. D. N. Y. May 9, 1956. Families of British subjects, residents of Barbados, who had perished in a collision off Trinidad between a Liberian and a British vessel, sued the owner of the Liberian vessel in the New York District Court. Meantime, libellants retained counsel in Barbados, disclaimed the New York proctors, made settlements, obtained approval of the Barbados Colonial Court of Admiralty, and released the owner of the Liberian vessel from liability, all without notice to their New York proctors. Held, that the Court would not for reasons of international comity and expediency re-examine the Barbados settlements, and that proctors, claiming that settlements were procured in part by fraudulent misrepresentations may seek redress in the Barbados courts; but a motion to dismiss made by the shipowner on the ground of *forum non conveniens* will be held in abeyance until fees, properly payable to the proctors by the shipowners, are determined and assessed by a Special Master to hear and report.

Artia v. Colosseum Records, 150 F. Supp. 555, U.S.D.Ct. S.D.N.Y. Mar. 22, 1957. In a suit for damages and injunction against defendant alleged to be reproducing and selling phonograph records of recordings belonging to plaintiff as assignee of a Czechoslovakian corporation whose property was nationalized in 1948, it is a sufficient defense, among others, that since the title presumably is in the Republic of Czechoslovakia, the plaintiff has failed to join that State as an indispensable party.

Berendson v. Rederiaktiebolaget Volo, 149 F. Supp. 141, U.S.D.C. S.D.M. Oct., 1956. Where Estonian citizen, signs on in United States a Swedish vessel and sustains injuries aboard outside United States territorial waters, he cannot recover under the Jones Act. Swedish law, the law of the flag, applies and U.S.D.Ct. will not retain jurisdiction. Libellant-sailor has the Swedish consul in Boston where hearings on the accident were held, as a convenient forum to determine and have his damages paid him under Swedish law.

Benz v. Compania Naviera Hidalgo, S. A. U. S. Supreme Court, 77 Sup. Ct. 699, April 8, 1957. The Labor Management Relations Act of 1947 does not apply to a dispute between a foreign ship and its foreign crew, which breaks out as a strike, supported with picketing by American labor union members while the ship is in an American port. A Panamanian corporation owned the ship which sailed under a Liberian flag, after signing up German and British nationals at Bremen, under British articles of agreement. While a foreign ship entering American waters subjects itself voluntarily to American law, yet jurisdiction of the United States is not mandatory but discretionary, and since Congress failed to make the Act expressly applicable to wage disputes on foreign vessels, the Supreme Court will not read into the Labor Management Relations Act any Congressional intention to change the contractual provisions made by foreign seamen with their foreign employer under British articles, by holding that the Act was intended to cover such disputes. (Douglas, J. dissented)

Bergman v. American Liberty Mutual Insurance Co., 161 N.Y.S. (2) 390, N. Y. Municipal Court, Manhattan, Nov. 16, 1956. An exclusory provision of an insurance policy on a ring, fixing noncoverage of loss or damage where a plane is in an "actual, impending or expected attack" by one sovereign power against another and doing an act that should be "hindered, combated or defended against," did not apply when an Israeli passenger plane carrying a passenger with the insured ring is shot down in the vicinity of Bulgaria by Bulgarian military personnel, with loss of passengers, and judgment was granted on the policy insuring the ring.

Burna v. United States 240 F. (2). 720, 4 C.A., Jan. 7, 1957. Action under the Federal Tort Claims Act by United States citizen against United States for personal injuries sustained on Island of Okinawa from negligent operation of a government-owned vehicle, dismissed on ground that under the Act, "claims arising in a foreign country" are specifically excluded. Under the Japanese Peace Conference of 1951, transfer of "provisional administration" to the United States, (a temporary measure of sovereignty) did not make the island a part of the United States, and it remains in the sense of the F.T.C.A., a "foreign country".

Estate of Peter Corigliano, N.Y.L.J. June 7, 1957, p. 7, col. 6. The Italian consular officer in New York has the right, under the U. S.–Italian Consular Convention, to receive funds on behalf of an infant national of Italy who is a distributee of the estate of a New York decedent. The special guardian of the infant recommended to the Surrogate's Court that the infant's share be deposited in a New York bank to be held until the infant reaches majority. The Court however ruled in the Italian consul's favor, holding that the convention provided no limitation as to infants' property.

Forbes v. Brownell, 149 F. Supp. 848, U.S.D.Ct. D.C., Jan 31, 1957. An alien, British subject, residing in Canada, seeking admission into the United States, and having been convicted of bigamy under the Canadian Statute, may not be excluded under the Immigration Act, as an alien "who has been convicted of a crime involving moral turpitude," since under the Canadian Statute "moral turpitude" is not necessarily inherent in a conviction for bigamy, which under Canadian law, is not a crime requiring proof of "*mens rea*" or criminal intent. Applicant's second marriage arose upon a mistake of fact in that he reasonably believed the woman he first married had divorced him; such conduct does not constitute "moral turpitude," and the alien is admissible.

Gallardo v. Haytian Commercial & Development Co., S.A., N.Y.L.J. May 23, 1957, p. 6, col. 4. In a suit for an accounting, where the underlying data, vouchers, bills, etc. in support of the account are in Spanish, (the account itself being in English), the accounting party, on application of his opponent, will be required either to have the data translated, or to engage a competent translator to be present on the examination before trial, and who will be authorized to properly mark the papers and documents used thereon.

Global Commerce Corp. v. Clark-Babbitt Industries, 239 F. (2), 716, 2d C.A., Dec. 17, 1956. A contract for sale by American exporter to plaintiff, Mexican importer, made by telephone, telegrams to Mexico, and personal talks in New York is governed by the Mexican law as to the creation and validity of such contract. Mexican Law does not require a writing, thus eliminating defense of New York Statute of Frauds. New York "center of gravity" doctrine (*Auten v. Auten* 308 N.Y. 155) was adopted by the 2d C. of Appeals.—viz: determination of the jurisdiction which has the most significant contacts with the dispute, which is most intimately concerned with the outcome, and whether one

rule or the other produces the best practical result.

Grivas v. Alianza Compania Armadora, 150 F. Supp. 708, U.S.D. Ct., S.D., N.Y., April 25, 1956. Greek seamen, hired in New York as part of a crew of ship then on the West Coast, owned by a Panamanian corporation, but with a Liberian registry, boarded vessel on the Coast, went on a sit-down strike, were removed by the police and later deported, sued for vacation pay, overtime, damages for discharge and for other items. Held, that libellants could recover wages for the short period from the day they were engaged and were awaiting transportation to the Coast, but were not entitled to the benefits of the Panama Labor Code for any other items since that Code does not by its terms apply to ships registered in and flying the flag of another country. Panama has not imposed any requirements on such foreign ships to the effect that they comply with the Panama Labor Code. Furthermore, under Panama Commercial Code, Art. 1080, ownership of a vessel by a Panamanian corporation does not make it a Panamanian vessel, unless registered as such; thus ownership of the vessel by a Panamanian corporation does not in and of itself entitle the crew to the benefits of the Panama Labor Code.

In re Herz' Will, 163, N.Y.S. (2) 349, Surrogate's Court, Nassau Co., N.Y., June 11, 1957. Sums payable out of the principal or income of a decedent's estate to residents of Hungary will be paid into Court pursuant to §269 of the New York Surrogate's Court Act, since recent events in Hungary have not been reassuring so as to render it likely that the beneficiaries would have the benefit, use, or control of the property in question.

Lanman & Kamp—Barclay & Co. of Columbia v. Commissioner; 26 Tax Court, No. 72, June 19, 1956. Colombian "patrimony" tax on property, though one element of a "single tax" made up of three parts (income, excess profits, "patrimony") will be classified, not by Colombian law, which characterizes "single tax" as predominantly an "income" tax, but as a "property tax" under criteria established by United States Internal Revenue laws. Accordingly, "patrimony" tax does not qualify for "foreign tax credit" allowance under §131, I.R. Code 1939.

LeMaire v. Kentucky and Indiana Terminal Co., 242 F. (2) 884, U.S.C.A. (2d) April 2, 1957. In 1911 an American corporation issued in England bonds designated as "gold coupon bonds," and bondholders sued for gold value. In 1931, England went off the gold standard. In a class action based on diversity of citizenship, brought in 1954 for a declaratory judgment, the Court held New York law controlling, under *Klaxon v. Stentor* 313 U.S. 487. Since that law referred the Court back to English law to decide questions of construction and performance of the contract, English cases determining the meaning of "gold" were analyzed and the Court held that in view of the previous acceptance by the bondholders of payments in depreciated pounds and their failure to press an action to construe the bonds as having a gold value clause, the issuer never understood to make the bondholders whole in the event that Great Britain some day went off the gold standard. The bonds therefore were payable in current British legal tender rather than at gold value.

In Re *Keller's Petition*, 149 F. Supp. 513, U.S. D. C't. D. Minn. 4th Div. Aug. 17, 1956. A federal district court lacks jurisdiction in a case involving a boating accident on Lake Nipigon, Ontario, Canada, a lake connected to Lake Superior by a river which has never been navigable or used as a highway of commerce between the United States and Canada, since such river and lake, not being "navigable," are not within the constitutional concept of admiralty jurisdiction, and the mere fact that some Canadian courts might have followed the United States courts as to tests of navigability did not mean that their decisions could be

utilized to broaden or extend United States admiralty jurisdiction to Canadian waters.

Estate of Margaret McNally, N.Y. Law Journal, May 23, 1957, p. 7 Col. 4, N.Y. Surrogate's Court. A will was executed in Scotland. Decedent died a New York resident. The will was propounded by the Public Administrator of New York County, after renunciation by the sole executrix of letters testamentary. Probate was asked under §22(a) and 23 of the New York Decedent Estate Law, on proof that the will was executed in Scotland in the mode prescribed by that country's laws. It was pen-written, but not signed by decedent, since she could not write; a Scottish solicitor signed at the end as did two witnesses, after a clause stating that will was read to testatrix and signed by solicitor with her authority. Held, that while the will was not executed according to Scottish law (which requires that where a deputy signing a will on behalf of a testator must be a parish minister acting in his own parish or his assistant and successor), the will nevertheless could be admitted to probate under §21 of the N. Y. Decedent Estate Law which permits execution of a will by the signature of an agent of the testator who has adopted the name of his deputy as his own subscription.

Marie G. Crerar v. Commissioner; 26 Tax Court No. 86, June 27, 1956. U. S. citizen, residing in Canada during 1952, and deriving all her income from the sources within the U. S. will be taxed not at flat rate of 15% of gross income, as provided under 1942 U. S.-Canadian Tax Convention, but under U. S. I. R. Code, 1939, rates.

Mortensen v. Knight, 305 P. (2d) 463, Sup. Ct., Arizona, Dec. 28, 1956. The Spanish civil-law concept of the ownership of property acquired during coverture as property jointly owned "by halves" by the husband and wife is consistent with the concept prevailing in Arizona, California and Texas of the "common property" of husband and wife, acquired during coverture. Defendant-husband who operated automobile, owned as community property by himself and wife, is liable in a personal injury action under "family purpose" doctrine, for the control and management.

Motor Distributors v. Olaf Pedersen's Rederi A/S 239 F. (2) 463, 5 C A., Jan. 8, 1957. Six alien owners of cargo filed libel *in rem* in U.S.D. Court against a Norwegian vessel for loss of goods after collision off coast of England with a German vessel. The Norwegian vessel was arrested in Florida. District Court's refusal to take jurisdiction reversed, on ground that where court has jurisdiction of ship, and the controversy arises *communis juris*, jurisdiction should be taken, unless to do so would work an injustice. An alien plaintiff in case of collision on the high seas can sue an alien defendant in the United States courts wherever in the country he can attach his property or serve him. Such a case can generally be more impartially and satisfactorily adjudicated by the court of a third nation having custody of the *res*.

Mproumeriotis v. Seacrest Shipping Co. 149 F. Supp. 265, U. S. D. C't. S. D. N. Y., March 8, 1957. Greek alien seaman signed articles in Pennsylvania, joined the ship, later sued Panamanian corporation, owner of the ship (carrying the Liberian flag), following his injuries sustained while vessel was in Canada. Held, since both parties are aliens, diversity jurisdiction was lacking, and connecting factors significant in determining the applicable law in the case, preponderated substantially against invoking the Jones Act. Since plaintiff did not rely on the articles, his argument that he was unable to read them was without merit; also fact that he joined ship and signed in Pennsylvania, does not bring American law into the case, (citing *Lauritzen v. Larsen*, 345 U.S. 5711, which listed and discussed the weight and significance of the factors that alone or in combination influenced the choice of

law to govern a maritime tort claim.) The place where a seaman shipped or reshipped is of no moment, nor is fact that the majority of the stock ownership of defendant Panamanian Corporation, is American, of itself sufficient to warrant application of Jones Act. Domicile in the United States of a claimant under the Act is a significant connecting factor, but was lacking in this case. Motion to dismiss action was granted.

New York & Honduras R.M. Co. v. Riddle Airlines, 162 N.Y.S. (2) 314 N. Y. App. Div. 1st Dept. Apr. 30, 1957. Plaintiff delivered to a Honduran airline for delivery to the United States by a United States connecting airline a cargo of bullion at a declared value of $100, though the actual value was over $50,000. Bars worth $28,000 were lost in transit between Miami, (where the Honduran line delivered up to defendant) and destination Perth Amboy. Plaintiff, to get advantage of lower freight rate, induced the Honduran line to amend its tariff (on file with the Civil Aeronautics Board) to permit it to carry the bullion at less than actual value. Defendant's tariff however permitted acceptance of bullion cargo only when *actual* value was declared. There were no interline agreements between the two airlines or through rates or services in effect or authorized by the Civil Aeronautics Board. Held, that since U. S. carrier failed to amend its tariff comparably to Honduran's, the latter's reduced value did not inure to the former, and since the reduced value was a prohibited deviation from the U.S. carrier's tariff, it must pay the actual value of the loss.

Oakland Truck Sales, Inc. v. United States, 149 F. Supp. 902 U. S. Court of Claims. The Court of Claims has jurisdiction of a suit against the government by a purchaser of former U.S. Army surplus property from a German corporation which was ordered not to deliver it to plaintiff. Suit had been brought by plaintiff against the German corporation in the courts of the Federal Republic.

28 U.S. Code, §1500, ("Pendency of Claims in Other Courts") denying the Court of Claims jurisdiction where a suit is brought in any other court against the U.S. or any person "... acting or professing to act, directly or indirectly under the authority of the United States," is not applicable, since, despite treaty arrangements between the U.S. and the Federal Republic relating to settlements affecting sales of surplus property or reimbursement by the U. S. for any judgments against the Federal Republic on such account, neither the German corporation nor the German government is an "agency of the United States." The Court withheld action, but denied a motion for judgment on the pleadings, pending the final outcome of the German litigation.

Rodriguez v. Gerontas Compania De Navegacion, 150 F. Supp. 715, U.S.D. Ct., S.D., N.Y., April 25, 1957. The Labor Code of Panama, whose provisions are essentially similar to a workmen's compensation law, are applicable to a consideration of the rights and remedies of libellant, an assistant steward aboard a Panamanian flag steamship, in connection with an accident resulting from a fall in the pantry of the vessel while en route to Nova Scotia.

Estate of Rougeron, N.Y.L.J., Mar. 11, 1957, p. 8, Col. 7. N.Y. Surrogate's Court. Contestant, born in France in 1903 out of wedlock, objected to probate of will of U.S. domiciliary who died in Switzerland. Contestant had been recognized in 1903 by his putative father under French law as his natural child. Under Swiss law, inheritance rights are granted to a recognized natural child. Swiss Court of Appeals, Geneva canton, held however, that decedent had lost French nationality by acquiring U.S. citizenship and that contestant had thus lost inheritance rights. N.Y. Surrogate's

Court held that Swiss judgment is binding and conclusive on the same parties in a New York proceeding but that independent examination by the Surrogate's Court of domicile issue sustained the finding that decedent was a New York domiciliary at time of his death, and accordingly under N.Y. law contestant, as illegitimate child, has no status to contest will.

Shoemaker v. Malaxa 241 F. (2). 129 C.A., Feb. 15, 1957. A stateless person whose citizenship had been revoked by his native country is not a "citizen or subject of a foreign state" within the meaning of the diversity of citizenship jurisdiction statute (28 U.S.C.A. §1332 (a) (2)), and complaint against him for attorney's fees was properly dismissed for lack of jurisdiction.

Spero v. Steamship The Argodon, 150 F. Supp. 1, U.S.D. C't. E.D. Va. Norfolk Div. Apr. 19, 1957. A Greek citizen, signed on a British vessel at Bremen, and was injured while the vessel was at Norfolk loading cargo. Held, that the law of the flag controls the maritime tort. However, no effort was made to prove the British law since it is substantially the same as United States law.

Société Internationale etc. v. Brownell 243 F(2) 254, U.S.C.A.D.C. Cir. May 10, 1957. District Court seven years previously had ordered plaintiff, (in an action against the Attorney General to recover its assets seized in the United States as enemy-owned and vested in the Alien Property Custodian, on the ground that it had not been an enemy or ally of any enemy) to produce for inspection, the records (determined by the Court not to be privileged) of a Swiss banking house. Plaintiff managed to produce a large number, but obtained an extension of time from the District Court to accomplish a full discovery under a plan, approved by the Swiss government, to permit a neutral, independent investigator to inspect the files and determine the relevancy of unknown remaining records and to produce them by letters rogatory or copying. The Circuit Court sustained District Court's dismissal of the action as not fundamentally unfair or arbitrary, since United States procedural as well as substantive laws may not be relaxed merely because of difficulties a party may have with a different sovereign power whose laws prohibit disclosure of banking records. Nothing short of a complete release of the papers by the Swiss Government would be necessary to comply with the orders, leaving the Court or its representative to determine relevancy under United States laws. A District Court has no power to permit a neutral to replace the Court or its Special Master in a proceeding to determine relevancy or what records are to be produced.

Southwestern Shipping Corporation v. Anlyan, 160 N.Y.S. (2) 674, Trial Term, N.Y. Supreme Court, Feb. 18, 1957. In controversy relating to ownership of funds transferred from Italy to the United States, New York law will be applied in the absence of any proof of Italian law.

Stowski v. John Hancock Mutual Life Insurance Co., 163 N.Y.S. (2) 155, N.Y.Sup. Ct. Trial Term, March 29, 1957. In an action by beneficiary against carrier for accidental death benefits allegedly due under policy covering manager of munitions vessel fatally injured in June 1948 in attack on it in Tel Aviv harbor by Israeli army, a certified copy of President Truman's report to Congress concerning United Nations activities during 1948 and containing relevant historical facts on the Israeli situation of that year, will be considered by the Court as a document worthy of confidence without further production of evidence, as an aid in determining the relevant historical facts of which the Court will take judicial notice, in order to ascertain applicability of exclusionary clause of policy avoiding liability of carrier if "death results, directly or indirectly, or wholly or partially from injuries intentionally inflicted on insured by any person. . . or

from a state of war, riot or insurrection".

Sunberg v. Aktiebolaget etc., 163 N.Y.S. (2). 253, City Court N.Y.Co., Sept. 29, 1955. Plaintiff, passenger on Swedish vessel leaving New York, received east-bound ticket and a prepaid order for west-bound passage to be exchanged in Sweden for west-bound contract. Plaintiff suffered injuries on high seas. Defendant moved for summary judgment on ground that action was barred by the one year statute of limitations in the contract. Denied, on grounds that since the contract exchange took place in Sweden, Swedish law governs. The Court stated that in order to determine whether the one year statute in the contract is valid under Swedish law, it would have to apply that law but could not take judicial notice of it since neither party had informed the Court as to the Swedish law. Questions of foreign law, if seriously disputed, the Court held, are best determined at the trial.

Szarf v. Blumenfeld, N.Y.L.J., April 4, 1957, p. 10, col. 7, Kings Co., Sup. Ct., New York. In accounting action, based on agreement made in West Berlin to engage in a joint venture for purchase and sale of commodities, Court will not under §344-a of N.Y. Civil Practice Act take judicial notice of West Berlin Statute of Limitations unless the amended complaint sets out, not a conclusory allegation that under such law the action was brought within time limited therein, but the substance and effect of the foreign law as found in the statutes and judicial opinions, in such a manner as to enable the Court to determine its meaning and effect, so that any dispute relating thereto may best be determined at the trial.

Varga v. Credit Suisse, 162 N.Y.S. (2) 80, Special Term, N.Y. Supreme Court, April 22, 1957. In an action for breach of contract by plaintiff, who was Prime Minister of Hungary, prior to establishment of Hungarian People's Republic, against defendant bank to recover monies placed at his disposal to create a fund for the maintenance of the Government of Hungary should it be exiled from the country, where the bank paid over such fund to the successor government, the Hungarian People's Republic, the Court, on a motion to dismiss complaint, will assume that under Hungarian law, creation of the fund was in fact authorized, and plaintiff, though he lacks capacity to sue as "President of the National Hungarian Government," since the United States does not recognize that Government, but recognizes the Hungarian People's Republic, may nevertheless maintain the action in his individual capacity on behalf of himself and others for whose benefit the fund was created and who suffered damage as a result of the bank's payment to the present Hungarian government.

In re Venti's Estate. 163 N.Y.S. (2) 116, Surrogate's Court, Westchester Co., N.Y., Dec. 5, 1956. In an administrator's accounting proceeding, consul general of Italy may examine witnesses, residents of Italy, regarding a claim for legal services rendered decedent and asserted by an Italian national, their testimony being material and necessary, especially since claimant would be barred from testifying under N.Y. dead man's statute (§347 Civil Practice Act).

Zalomanis v. U.S. 149 F. Supp. 169, U.S.C. of Claims, Mar. 6, 1957. In suit in Court of Claims for interest on refund of income taxes by Latvian residents of U.S., the issue as to whether there exist within Soviet Latvia any courts in which U.S. citizens can prosecute claims against the Latvian government under the judicial reciprocity required by 28 U.S.C. §2502 ("Aliens privilege to sue in the U. S. Court of Claims"), must be left to the Commissioner of the Court of Claims, to be determined as a fact on the trial after expert testimony and Government's motion to dismiss on the ground of absence of judicial reciprocity was denied.

Book Reviews

LAWSON, F. H. *A Common Lawyer Looks at the Civil Law.* With a Foreword by Hessel E. Yntema. Ann Arbor: University of Michigan Law School, 1953. Pp. xvii, 238.

This fascinating book collects five lectures delivered as the Thomas M. Cooley lectures at the University of Michigan by the well-known Professor of Comparative Law of Oxford University.

Much could be expected from this "look" at the civil law by a common lawyer who has already many times shown his familiarity with the system. The reader's expectation is fully satisfied.

The value of the book may be considered as twofold. It constitutes, first, an introduction to the study of civil-law systems. This introduction appears essentially historical in character, since the author deals successively with the historical background, the form and the sources of the civil law, the contribution of Roman law, the advance beyond Roman law, and non-Roman elements in the civil law. The second chapter, however, devoted to the form and sources of the civil law, considers the civil law as it is, and not only in its historical perspective. The book constitutes, furthermore, a precious collection of reflections upon the civil law. In explaining what it is to common-law students, Professor Lawson has been led to many comparisons and remarks which are of equal interest to lawyers on both sides of the ocean.

The book is far from being a mere exposé. The author's personality is such that, apparently unpurposely, he has written a thesis and in a very quiet and modest manner has advanced as ordinary statements many propositions which certainly challenge the general opinion.

Such, for instance, is the statement (p. 45–46) that the difference between the civil law and the common law is basically one of substance and not one of method. Professor Lawson, as he knows, runs counter to the general view, expressed by Dean Roscoe Pound, to whom he refers. But one may ask the question whether the author has not become so familiar both with the common law and the civil law, and feels so much at home in each of them, that he reduces the importance of their differences in methods. In a very fortunate manner, he himself, referring to a previous writing, describes the common law as being "less a formal system of thought than a diffused wisdom derived from the collective tradition of a profession and from long personal experience in the handling of legal problems" (p. 63). Surely, this could not be said of the civil law, although based on a tradition of equal—or longer—length. Again, some of the most pleasant pages of the book may be found in the developments relating to the conceptualism of the civilians (p. 66 ff), or to the comparison between civilian and common law concepts, "much more like human beings whose personalities become known only by experience and may easily change in course of time." The differences which he underlines so strikingly between con-

cepts in both legal systems imply another approach to law, other methods. Furthermore, the sources of the law are in fact quite different, and there may be some paradox in considering as secondary the existence of codes in civil-law countries. Rightly, Professor Lawson has desired to depart from worn out clichés, which need shades and qualifications. The question is whether the unexperienced reader is not exposed to the danger of ignoring what is sound in these clichés.

Another position which is also of much interest, is the author's plea for a return to Roman law (p. 210–211). The place which should be given to Roman law in the law school curriculum is presently discussed in France. The reviewer has elsewhere expressed his biases: he considers that there is presently little need for Roman law as such. Precisely because civil law is conceptualist, the civil-law systems can be understood with a very limited knowledge of history. Precisely because it is codified, Roman law or ancient law are practically never used in a legal discussion, even an academic one; the number of references to history in the *Law Quarterly Review* is a surprise to a French reader. What remains true, of course, is that codes are not acts of pure will; as much as common law, they are the result of long tradition. To let students ignore their historical background would be to allow a deplorable lack of culture. But, in the reviewer's opinion to direct an important part of the student's time to historical studies would be a no less deplorable mistake. History should be taught mainly from a philosophical and sociological point of view and within limits. Justice Holmes, at the turn of the century, has written most valuable pages on the danger of the study of history, if taken from a certain angle. Our time requires the energy of our students. The study of the present civil-law system or, as far as civilian law students are concerned, of the present common law, backed by a limited historical introduction, but, on the other hand, extended toward the study of the civilizations in question, is the best contribution that our students can make to the improvement of their law and to a better understanding between the nations. Such is, at least, the reviewer's opinion which, of course, is not shared by all his colleagues of the French universities.

These are only two points among many which raise questions (would French lawyers agree with the statement on p. 56 that "it is wise not to take the civil codes too seriously; those who have to live under them do not"?). In his valuable foreword, Professor Yntema has chosen also to raise important questions on legal education in the United States, its spirit, its methods, its content. In a certain sense, the book may be termed a controversial one. It should be clear, however, that its value is above controversy. It will be discussed because it adds much to the traditional comparison of the common law and the civil law, because it is a challenge to current ideas. Its reading will be an enrichment to lawyers brought up in any system of law, both through the many original remarks that it contains and by the reflections to which it will invite the reader.

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BATIFFOL, H. *Aspects philosophiques du Droit International Privé.* Collection "Philosophie de Droit" (4). Paris: Librairie Dalloz, 1956. Pp. 346.

This study by the leading French authority on private international law is apparently the first systematic examination in philosophic terms of the existing positive law in this field. As explained in the preface, the object is not to set forth a new system to justify the existing conflicts rules, but to ascertain in the light of the solutions and trends of positive law the social realities that the rules regulate and represent. For such inquiry, private international law, being intimately related to internal private law, to comparative private law, and to public international law, invites consideration of the chief problems of legal theory. The penetrating analysis of these problems as presented in this context is of great interest not only for the doctrine of conflicts law but equally and even more immediately for legal philosophy in general. For, to paraphrase the passage quoted by the author from Hubert, the philosophic problem here as elsewhere concerns the origin, meaning, and end of law, and their interrelations.

After a brief introduction indicating why systematic study of these aspects of this branch of law has been so long delayed and now is prompted by the renascence of comparative legal studies, the argument divides into three chapters. The first presents the author's conception of private international law as an order of legal systems; the second evaluates certain methods of co-ordination; the third projects a synthesis in terms of the "perspectives" or trends in the positive law. The chief points in the argument, which critically marshalls the prolific pertinent literature, may be summarized as follows—we trust without undue distortion.

First, the conception of private international law as an "order" of legal systems, as indicated in the first chapter, contemplates the formation of law in systems; more specifically, these constitute, not abstract hierarchies of hypothetical norms in Kelsen's style, but positive legal rules rationally integrated in terms of general objectives and in the light of experience. It is the function of conflicts law to co-ordinate the application of such systems in individual cases where they seem to overlap. In national courts, this requires analysis of foreign law and corresponding refinement of domestic concepts to allow alien institutions to be subsumed under the *lex fori*; characterization by reference to the *lex causae* or in terms of comparative concepts is therefore rejected. The former merely transposes to another legal system, but does not solve, the problem; the latter is deemed impractical, leading to a system of abstract rules divorced from any positive law.

To the author, this function of conflicts law is gravely breached by the notion of liberty of contract, widely recognized for international contracts, viz. that for these mere consent of the parties, and not law, may be the source of obligation. Against this subjective conception basing law in individual will, the author sets the inefficacy of such implied reference to natural law, the increasing limitation of freedom of contract by internal legislation, and the inevitable reference in international contracts to some positive law. Hence, it is proposed that, in a more moderate view, the so-called "autonomy" of the parties to such

contracts denotes their power to localize the elements of the transaction, not to choose the applicable law, and that the underlying conflict between liberty and law may be resolved by the possibility of freedom to act conformably to law.

Analysis of the existing system in which municipal courts are called upon to decide questions of private law arising in international transactions involves an explanation of the usual treatment of foreign law as "fact," differing in value from the internal law, which is mandatory. The former is regarded as what is, the latter as what ought to be; this effect of the *lex fori* is limited to its territorial jurisdiction but is there exclusive. In philosophical terms, the explanation is ascribed to the duality of law as imperative volition and reason; the former relates to its nature, the latter to its essence. Thus, it becomes possible for private international law to adjust the applications of local and foreign law in universal rational terms or, in other words, to organize an international order for private transactions.

In the second chapter, the modes of co-ordination—by reference to natural law, sociological investigation, and the ends of law—are analyzed. Natural law is currently rejected as an ideal system of specific norms, but its significance as an expression of innate *general* ideas is not to be ignored. Illustrations of the influence of such ideas are afforded by the modern recognition of aliens as persons entitled to normal rights, the universal exception of public policy in defense of moral ideas, and the argument from the "nature of things," urged by Savigny, as justification for systematic, rational solution of legal problems. Sociological inquiry involves consideration of public opinion (*représentations collectives*), spontaneous uniformities in conduct, and social structures inferred from established, externalized attitudes in a community. But this method, while emphasizing the need to observe social facts, does not indicate their significance for the purposes of law; even for sociology, factual description imports reference to ends.

The third method of evaluation, thus shown to be indispensable, involves analysis of the social facts represented by positive law in terms of doctrinal conceptions of the ends of justice. The dangers in this approach to legal problems are exemplified by the failure of Mancini and Pillet to construct acceptable systems on overgeneralized concepts of individual personality or public interest, by the relativism of international harmony of solutions as an objective, and by the inadequacy of the more realistic idea of private utility, which fails to take due account of the general interest.

In lieu of such incomplete explanations, the author sets forth, in the third chapter on "Perspectives of the Positive Law," an analysis, taking account of private, general, and international interests, of three leading ideas that characterize existing trends in private international law. The first is the instinctive tendency of the courts to find an objective localization, a "materialization" in the facts, as a ground of solution. Thus, the expanded application of the *lex situs* and the tendency to localize obligations arising from torts and even contracts, especially when third parties are in question, presents an analogy to

the efforts to delimit the respective legislative jurisdictions of states in the international community, exemplifying the need for an objective measure to integrate individual and general, national and international interests. These are inevitably interrelated in varying degree; the task of law is to specify the limitations to be imposed upon private activity to promote the general good.

A second tendency, perhaps more evident in France than in the Anglo-American world, is to protect the homogeneity and authority of the national law (*"la loi"*). On these grounds, the author explains the superiority of nationality over domicile as a more stable criterion of the personal law. This example leads to an instructive analysis of the development of law as polarized in the tension between reason and experience; legal method involves both utilitarian empiricism, emphasizing the ends to be attained, and rational deduction, seeking to synthesize particular legal rules under general directives of natural law. Indeed, the persistent effort to rationalize the positive law evidences the instinctive perception that only a coherent legal system will serve the primordial ends of justice: certainty and equality. For this reason, extraneous elements are excluded on grounds of public policy, both to preserve the integrity of the legal system and to maintain its authority.

A third trend is the increased recognition of foreign legal systems, implying the existence of an international society. The question whether the solution of conflicts problems by municipal law involves consideration of their international aspects is affirmatively answered by the study of conflicts of characterization, the recognition of foreign judgments, and the renvoi doctrine, all of which require understanding of foreign laws by the forum and their co-ordination in an international order. Here, as in domestic law individual claims must be integrated with collective interests, the latter are to be reconciled with those of the international community. In this light, the explanation of renvoi as a renunciation of internal law, respecting the sphere of foreign law, and the cogent criticism of *revision au fond* in the recognition of foreign judgments, are of special interest. Private international law thus portends a hierarchy of values: in the first stage, those of individual liberty and the independence of states; in a more advanced evolution, the claims of interindividual or general interests and, at the international level, the abandonment of isolationism. In this hierarchy, while the value of the human person transcends that of the state and the international community, since these in the last analysis represent the interests of human beings, yet even humanity cannot be regarded as a self-sufficient finality, but only as an end intermediate to an ultimate, valid of and in itself—the Absolute.

The work contains an index of authors as well as a detailed table of contents; the only serious error noted is the ascription on page 239 of the hypothetical case of a tort committed in the Canadian wilds by one member of an American group on another, propounded by Morris in an article in the Harvard Law Review, to the United States.

This cursory review of the contents will suggest the scope and significance of the philosophic aspects of private international law as envisaged by the author

and, it is hoped, may invite the reader to examine the work for himself. In any event, the range of the argument defies due appreciation of its many implications in a review. Instead, a few impressions may be noted.

The first and principal observation is the value of the painstaking analysis of the rational-empirical process by which law is formed, presented in this work, for legal philosophy. This is the fundamental technique by which the Civil Law from the days of Rome to the modern laws of the Western World, and indeed the Common Law as well, has been formed and reformed. The sympathetic, subtle interpretation of this technique in all its philosophical implications, underlining the role of deductive systematization in the formulation of law, is the outstanding contribution of this work.

On the other hand, from the viewpoint of the theory of conflicts law, certain reservations should be registered. We are all time-bound, and doubtless these reflect differences in milieu that prescribe in some degree legal thought. Needless to say, the present work is oriented primarily in the Civil Law, not the Civil Law of the *Ancien Régime* which in a degree paralleled the Common Law, but a modern civil-law system in which doctrine is couched in the format, or at least predicated upon the prescriptions, of the *Code Napoléon*. This and the later modern codes, it would seem, have indelibly consecrated two related presuppositions that have since appeared more or less axiomatic in legal speculation: first, the supremacy of the national, territorial state as the source of law; and second, the consequent primacy of the written law and the "plenitude" of the legal doctrine derived from the code. In contrast, in the atmosphere of the Common Law, as we suspect was also true on the Continent before the civil-law *usus modernus* was stereotyped in the codes, such notions are not so compulsive, and jurisprudence is not constrained by the presence of a code to move within the shadows of the school of exegesis. In other words, the conception of the common law implies that the basic law obtains *non ratione imperii sed imperio rationis* and that the exceptions made to its application, as by legislation, should be with the consent of those affected.

This attitude seems both possible and advantageous for the development of private international law. Here certainly, common comparative studies are to be encouraged, looking to mutual understanding of the existing laws and a modicum of order in the sphere of international commerce. And in the absence of *specific* prescriptions, as is typical in this field of law, it is not only possible but inevitable that the courts should look to currently accepted doctrine to fill the gaps; the interpretation of the Full Faith and Credit Clause in the United States Constitution in reference to judgments in accordance with the practice of the early Nineteenth Century, affords an illustration that has many parallels elsewhere. Hence, private international law offers real opportunities to utilize comparative research in the development of common doctrine. The private international law of France, for instance, seems almost, if not as much, a jurisprudential construction as the equivalent doctrines in the common-law world. And yet both are admittedly "positive" law.

In this light, the emphasis laid by the author on the rational element in the elaboration of private international law represents a significant advance over more mechanical theories; the question on which reservations suggest themselves, is simply whether the argument has been carried through to its natural conclusion. For example, the conception of conflicts law as directed to the coordination of legal systems still seems to speak, though more genially than its predecessors, in terms of delimitation of national spheres of legislation. This subordinates the obvious facts that conflicts problems are incidental to private litigation and that their solution may be basically influenced by policies expressed in municipal law. It seems artificial to abstract conflicts law from the social fact situations to which it is applied by the courts, thus divorcing this branch of law from its substantive context. In fact, the intimate connection between conflicts law and private law and the necessary comparative adaptation of foreign legal institutions under the *lex fori* is admirably presented in the author's discussion of the problems of qualification. Incidentally, so far as the reviewer can judge, this does not deviate, except in emphasis and point of departure, from Rabel's view that the forum in the interpretation of its conflicts rules should employ internationally acceptable concepts, ascertained by comparative study of the existing laws.

The presupposition that *"la loi"* is the exclusive form of law warrants a further reservation on the author's view of the doctrine allowing the parties "autonomy" in the choice of law to govern their contracts. In this view, voluntary legislation may specify legal relations, but not contract. It is true of course that, in modern legal systems of the Western world, the characteristic form of legislation is enactment by a representative body, but other forms are also admissible: international treaties, executive decrees and administrative regulations, doctrines elaborated in judicial decisions, and in a realistic view of the matter, even the views of law professors or the charter and bylaws of a corporation, for example. In a sense, how law is formed is a question of formal definition that the legal system itself must determine. Essentially, it thus would seem to be a question of convenience whether, in view of the anarchy of conflicts rules, those directly concerned should be allowed, and under what conditions, to specify the law of their contract, or this should be left to the variable mercy of some court as yet not ascertained.

The author's presentation of other questions, e.g., nationality, which seems to the reviewer ill-adapted to determine private rights within a federation such as the United States, or the notion of the *bonum commune*, which remains to be reconciled with human rights, invite other reflections, but space precludes. It should be added only that the foregoing remarks do not touch the analysis presented by the author in essential respects. This, it is clear, commands the attention of all students of legal philospohy and private international law.

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JESSUP, P. C. *Transnational Law*. New Haven: Yale University Press, 1956. Pp. 113.

In the Storrs Lectures delivered at the Yale Law School in February, 1956, reproduced in this volume, a distinguished authority on public international law addresses attention to "the law applicable to the complex interrelated world community," for which the term "transnational law" is proposed. This includes national law, foreign law, conflict of laws, or public international law, applying to transnational situations, which may involve individuals, corporations, states, international organizations, or other groups. Of the three chapters in the book, the first suggests the basic Universality of Human Problems by drawing dramatic parallels between domestic and international legal situations. The second, entitled The Power to Deal with the Problems, reviews the various bases of jurisdiction, conceived as "power," which turns out to be an elusive notion, and questions the lines between international and national, criminal and civil, public and private, jurisdiction for purposes of legal classification. "The fundamental approach," it is concluded, "would not start with sovereignty or power but from the premise that jurisdiction is essentially a matter of procedure which could be amicably arranged among the nations of the world" (p. 71). The third chapter on The Choice of Law Governing the Problems considers certain *fora* free from preoccupation with the rules applied by the courts of a particular country, as a means of clarifying the problem of choice of law in a "broad, nontechnical sense" and as emphasizing that neither the character of the parties or of the forum nor the distinction between civil and criminal precludes the application of one of the bodies of law into which the legal field is traditionally divided.

These lectures make lively reading, and the thesis as developed is thought-provoking. Evidently, the concept of "transnational law" is inspired by the discovery that it is artificial to limit international law to the relations between states, since international relations do not by any means necessarily originate or transpire in diplomatic channels—even those with which the foreign offices characteristically may be concerned. Hence, freedom from traditional conceptions of jurisdiction is needed to select the *lex conveniens* for transnational situations among the available bodies of positive law. This selection, the author indicates, should not be trammelled by outworn ideas, yet much study should precede the heavy hand of governmental action. Although the lines of such study are not developed in the lectures, these obviously would project the basic ideas advanced by the author: the universality of human problems, the inadequacy of notions of sovereignty or power as bases of classification, and perhaps, though this is not clear, the inappositeness of past experience with positive state-made law.

All this is of much interest from the viewpoint of private international law, which is but casually considered. For in the conflicts field, despite the typical territorial assumptions since Story's time, the central problem has been to contemplate human problems in terms of a universal rational analysis that can

be applied without prejudicial concessions to claims of state jurisdiction. This, for example, has been the chief virtue of the vested rights doctrines, characteristic of Anglo-American thinking in this field. Basically, the solution has been to apply the indicated foreign law to foreign cases, which necessarily separates the question of the applicable law from that of power—a distinction happily advocated in these lectures, but which publicists preoccupied with penal jurisdiction have been wont to ignore. All this leads of course to the venerable conception that, in the absence of positive limitations on the exercise of power, natural law in some sense should control. Which is to say in more modern terms that the lines of solution must be found in comparative study of the universal human experience to which the author appeals.

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LARENZ, K. *Lehrbuch des Schuldrechts*. Band I. *Allgemeiner Teil*; Band II. *Besonderer Teil*. München und Berlin: C. H. Beck Verlag, 1953–1956. Pp. 304; 413.

The law of obligations (*Schuldrecht*) is the core of German private law, covering roughly the area which in Anglo-American law is divided between contracts, torts, quasi contracts, and the various special contracts like sales, contract of service, and so on. The publication of a new book on this important subject is a major event to the lawyer interested in comparative and foreign law, especially if it has the qualities of Professor Larenz's new work. It is written in a fluent and readable style; it is of the right size, neither too compendious nor too short; it pays a good deal of attention to the social realities, the teleological functions of the law, without detracting from a logical and lucid arrangement and exposition.

The first volume deals with the general principles of the law of obligations. After a brief and original discussion of the concept of obligation (*Schuldverhältniss*), the author devotes six chapters to a discussion of general principles. He deals first with the formation of obligations, especially of contracts, then with the duty of performance (including the contents of the obligation), with breach and other obstacles to the performance of obligations, with satisfaction of the obligee by performance or otherwise, with assignment of rights or duties and, finally, with the plurality of parties (joint obligations). It is impossible here to go into any detailed analysis of the author's views. It may be sufficient to draw the reader's attention to topics which in the reviewer's opinion are presented with exceptional skill, like the law of damages and the principles of the promisor's liability for nonperformance. In this latter field, the author presents an individual approach to the problem of frustration of contracts, known in German law generally as the failure of the basis of the transaction (*Geschäftsgrundlage*). According to the author, a correct solution of this problem—one which is based on something more solid than "equity" of the case

alone—must begin by distinguishing between the "subjective" and the "objective" bases of a transaction.

The duty of performance is not frustrated by "failure of the basis of the transaction" unless one of two requirements has been fulfilled: either the parties have made the contract in view of special circumstances which subsequently have changed substantially (this is the disappearance of the "subjective" base of transaction), or the continued existence of certain circumstances required for the realization of the purpose of the contract has subsequently disappeared (this is the failure of the "objective" basis of the transaction). With regard to the latter, in turn, two groups of cases may be distinguished: either the balance between the counterperformances has been disproportionately upset (*Äquivalenzstörung*) so that enforcement of the contract would be contrary to good faith, or the purpose of the contract as expressed therein has become frustrated by subsequent events (*Zweckvereitelung*). The author, whose views are not shared by all, strongly doubts that there is any justification for looking beyond these two situations to free a party even from very burdensome contracts. The distinction he makes between unbalanced counterperformance and frustrated purpose is similar to the failure of consideration and frustration of purpose of Anglo-American law.

The second volume deals with special obligations. The work benefits much from the fact that the author has not accorded equal attention to the twenty-five groups of "typical" obligations mentioned in the German Civil Code, but has concentrated his discussion on the most important: sales contracts, torts, and unjustified enrichment. These three topics take up about half of the entire work of 413 pages, of which 96 pages are devoted to sales alone. Occasionally, the author resorts to the comparative method, especially when he explains the distinction between the sales contract and the abstract contract of conveyance, a peculiarity of German law which is not easily understood by foreign lawyers.

Throughout his book, the author alludes to case law and frequently refers to the latest works in this field. He has given each section a short, selective bibliography, which saves the reader from being submerged under the immense existing literature.

There may be many, and this reviewer is one of them, who disagree strongly with the political views Professor Larenz has expressed in some of his earlier works. This does not, however, alter the fact that this textbook is a notable contribution to German legal literature. It should be especially welcomed for its unusually attractive style and clear exposition, which do not detract from soundness and high scholarly standards of presentation.

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SCHMIDT, R. *Die Obliegenheiten. Studien auf dem Gebiet des Rechtszwanges im Zivilrecht unter besonderer Berücksichtigung des Privatversicherungsrechts.* Veröffentlichungen des Seminars für Versicherungswissenschaft der Universität Hamburg und des Versicherungswissenschaftlichen Vereins in Hamburg e.V. Karlsruhe: Verlag "Versicherungswissenschaft," 1953. Pp. xxii, 338.

In German legal language, the term *Obliegenheit* is comparatively young, nor has legal science intensively dealt with this phenomenon until recent decades. In fact, Schmidt's work[1] is the very first comprehensive study on this topic; it embraces the entire private law and purports to shape a general doctrine of *Obliegenheit* as a distinct legal institution. Although the author's task is a juristic one, he does not dispense with introductory considerations on the philosophical and psychological starting points necessary for "Studies on the Topic of Legal Compulsion in Private Law, especially in Private Insurance Law" (as he formulates the subtitle of his work).

The core of Schmidt's ideas may be reproduced in an abbreviated and simplified form, as follows: The law—in order to regulate the relations between its subjects—imposes duties upon the individual; it requires—under various fact situations—certain standards of conduct to be observed. But these duties are not, as far as their legal intensity goes, equivalent. On the one hand, there are "strong" duties in the technical sense, exemplified by a contract obligation. The criteria of such an obligation are, first, that it is imposed and will be sanctioned in the interest of the obligee, and, second, that the law provides for its performance at least by giving a remedy for damages in case of breach, or even (as regularly under German law) will enforce it specifically. At the other extreme, the legal order recognizes mere "duties in one's own interest." The typical case is the procedural burden of proof: its fulfillment is exclusively for the benefit of the "obliged" individual himself, and nonobservance does not give the other party any means of legal compulsion whatsoever. In between these two extremes, Schmidt recognizes a third group of cases where a duty is imposed in the interest of either party, the breach of which normally gives rise to legal sanctions other than an action for damages. The most generally known case of this type is the duty to mitigate damages for the compensation of which another party is liable, obviously this is for the benefit of the party subject to compensation as well, although no damage action will lie in case of its breach. Schmidt classifies duties of this type under the term *Obliegenheiten*, by which he understands duties of minor intensity of compulsion as distinguished from duties of major intensity of compulsion (obligations), on the one hand, and mere burdens (duties in one's own interest) on the other. While the law is indifferent as respects fulfillment of the "duty" in the last case, the categories of obligations and *Obliegenheiten* have in common a certain τέλος of the law to have the duty observed on account of the interest of another party involved.

[1] The author, a disciple of Hans Möller and now professor of law at the University of Hamburg, presented it as his *Habilitationsschrift* in fulfilling the requirements for membership in a German law faculty.

The term *Obliegenheit* originated in insurance law, which still is its major field of application, constituting one of the principal devices for the insurer to obtain control of the risks insured. It is difficult to define its scope exactly in terms of Anglo-American law, which lacks a general concept of this type. Roughly speaking, cases in which, for the benefit of the insurer, a statute or contract imposes certain conduct upon the insured the nonobservance of which does not give rise to an action for damages but—normally—to other sanctions, are the principal area covered by *Obliegenheiten*—at least by bordering cases which need to be delimited. (The language imposing the *Obliegenheit*—whether it provides for a duty *verbis directis*, or whether this result is reached by interpretation—is not crucial.) Thus, situations in which the insurer is protected in Anglo-American law under the doctrines of representation and concealment, as well as a good part of the area covered by warranties are a proper field for *Obliegenheiten* under German law. Other examples are the duties of the insured in case loss occurs (to give notice to the insurer, furnish necessary documents, appoint an appraiser, etc.).

The value of Schmidt's book for the German practising lawyer culminates in this very part where he deals with the *Obliegenheiten* of insurance law. He presents, under an elaborate system, all the source material, statutory provisions, cases, literature, which have accumulated, especially in the last fifty years, with his own views expressed in thorough discussion and criticism. At the same time, the work is not restricted to insurance law but also discovers and analyzes *Obliegenheiten* in general contract law and in the fields of property and inheritance.

From a comparative point of view, examination of Schmidt's work leads to some interesting observations. One relates to those *Obliegenheiten* of insurance law that fulfill the same functions as the common-law device of warranty. Although, conceptually speaking, the difference is of significance (and the areas respectively covered by the two concepts not entirely coincidental), there are similar tendencies in the material results. In both legal systems, legislatures have taken initiative; the freedom of the insurer to impose conditions upon the insured which are seemingly harsh has been restricted by statute. Generally speaking, these statutes provide for additional requirements (e. g., materiality of the breach, or causation between breach and insured event) over and beyond the insured's plain misconduct as a basis for sanctions against the insured. The German insurance code probably goes furthest in protecting the insured, but also under many American statutes today, a more lenient attitude towards the insured prevails as compared with the common law rules of Lord Mansfield.

Even more valuable for the comparative lawyer are the methodological aspects of Schmidt's treatise, as indicating an approach of the Continental code system towards the Anglo-American case method. Schmidt starts out with the premise that the German legal order can no longer be conceived as a purely logical system derived from the code. Instead, the latter has been more and more corrected, for other than logical reasons, through extralegislative sources, es-

pecially court decisions. He points out that the function of modern legal science is to investigate legal phenomena (*Rechtsinstitute*) which have been shaped not by the legislature but by case law, so as to harmonize them with the traditional logical system. This, as Schmidt sees it, is his own task with respect to one legal phenomenon of this class, namely the *Obliegenheit*. In solving this task with a scholarly outstanding performance, he has made a distinguished contribution to the development of an important and theoretically interesting area of the German legal system.

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CHESHIRE'S *Modern Law of Real Property*. Seventh Edition, by G. C. Cheshire, D. C. L., F. B. A., with an Appendix on the Rent Acts by J. B. Butterworth, M. A. London: Butterworth & Co. (Publishers) Ltd., 1954. Pp. lxi, 818 with Appendix, 80 pp. and Index 54 pp.

Strangely enough, this new edition of Cheshire does not yet appear to have been reviewed elsewhere: it is therefore even stranger that it should so happen that its first review should appear in an American journal above the signature of a New Zealander brought up under the New Zealand version of the Australian Torrens System.

The first edition of this book appeared in 1925 as something of a *tour de force*, having been written during a period of a little over eighteen months. It was then greeted by reviewers, including Sir William Holdsworth (see (1926) 42 L. Q. R. 158, 159–60) with enthusiasm as "a new departure," and Dr. Cheshire was said to "stand near the top of his profession so far as concerns knowledge of the new era in the law of real property."

The book can therefore be said to have been born a classic, and it would have been very easy for the author to have rested on his laurels and in the succeeding editions to have done no more than keep up with the law. However, during the thirty years between the first edition and the seventh, Dr. Cheshire has preserved a sufficiently fresh and energetic approach to his subject to demand constant revision, change, and reorganization of his text. The reputation of his book is now such that it is hardly necessary to say that each edition has improved on the preceding one, and it is a very great pleasure to be able to report that this is more than true of the present edition.

The Appendix on the Rent Acts is of course an innovation, but there are other changes, the principal one being in organization. Dr. Cheshire, having come to the belief that the classic law of real property was built up around the family settlement, and that historically the demands of the family preceded the demands of commerce, has entirely rearranged the first part of his book. After his admirable general introduction and discussion of the fee simple, Dr. Cheshire proceeds to deal with "family interests," including entailed estates, life interests, equitable powers, future, determinable and concurrent interests, interests upon condition, and trusts. Treatment of leaseholds, easements and

profits, restrictive covenants, rent charges and mortgages follows under the heading "Commercial Interests." It is possible to dispute the value of this rearrangement in the light of the effects of the legislative reforms up to 1925, but as the law of real property positively lends itself to disorganization it is a great advantage to have these particular fields dealt with within the framework of a definite plan. This is especially so when it is considered that the author's general views are, historically, of considerable force, and such an organization also lends itself more readily to a clear exposition of the continuity between the old common law and statutory rules, and the codification, consolidation, and partial reconstruction of the law effected by the 1925 Acts, which has always been a particularly valuable feature of the earlier editions.

Other changes are relatively minor. Dr. Cheshire has rewritten his explanation of the common law doctrine of the estate, and if it is possible to make clarity in a difficult field more clear he has succeeded in his task. Indeed, the whole book is a model of clarity and precision, and it is even more than that: Dr. Cheshire's terse and vivid style of writing makes even the dullest aspects of the subject come alive.

There is of course no need to say that Dr. Cheshire never sacrifices accuracy for interest, but what makes his book of particular value to the student is his uncanny knack of combining the two. One of the most unhappy memories of this reviewer's student career in real property was having to contend with the vicissitudes of Blackacre. He had not at that stage read Cheshire, and others now in a similar position may be interested to learn (on pp. 666–671) that Blackacre is identified by Dr. Cheshire (in a precedent of a conveyance executed by the owner in severalty of a fee simple absolute) as "ALL and singular the hereditaments . . . situate at Kidlington in the County of Oxford containing 24 acres 2 roods or thereabouts." It is also interesting to learn, from the same source, that Blackacre was conveyed by "ADAM SMITH of Balliol College, Oxford, Gentleman" to "WILLIAM BLACKSTONE of All Souls College, Oxford, Knight . . . in consideration of the sum of £5,000" on January 1, 1950. Somehow a conveyance from A. B. to C. D. is far less satisfying, and Dr. Cheshire's originality is not in any way lessened by the fact that Adam Smith conveyed Blackacre to Sir William Blackstone in 1926, (in the first, second, and third editions) in 1944 (in the fifth edition) and in 1950 (in the sixth edition). It is encouraging to notice that in spite of inflation the consideration has remained constant over this period at £5,000.

The addition of the Appendix on the Rent Acts will be welcome: while it is no substitute for Mr. Megarry's treatise on the subject (which, indeed, it does not set out to be), it is nevertheless an admirably lucid account of a difficult and confusing area of the law, and provides an excellent introduction to students of the topic.

There is little more that it would be appropriate to say about this edition which has not already been said far more capably about previous editions. All additions which fresh legislation and litigation have rendered necessary up to

the time of publication have been included, and throughout passages have been brought up to date and rewritten. There are a few blemishes in the presentation, but these are of such a minor nature that they are hardly worth mentioning. It may seem a pity to some that Dr. Cheshire or his publishers could not have devised a format which would have enabled inset cited passages to be included without the rather irritating quotation marks at the beginning of each line: now that this practice has gone out of fashion in almost every publication except the Law Reports, where it is retained for obvious reasons, it is inclined to be somewhat distracting. The English Court of Appeal has done some extraordinary things in its time, but surely it never meant to lay it down (in *Roe* v. *Russell* [1928] 2 K. B. 117) that a statutory tenant who sub-lets "must retain a sufficient possession or interest in the premises to preserve his statutory tights." (p. 850). Although it hardly effects a saving in paper or bulk, it would have been convenient if the publishers could have adopted the admirable practice of providing full references in the Table of Cases. These, however, are such minor matters that they pale into almost total insignificance beside the general excellence of the book as a whole.

It is only necessary to say in conclusion that Dr. Cheshire's treatment of the historical development of the law of real property makes investigation of the book by American readers well worth while. Although some of the topics dealt with are hardly applicable to conditions in the United States, a large part of Dr. Cheshire's treatment of his subject will prove rewarding and stimulating to American readers. Dr. Cheshire should be assured that his clear and lucid exposition of the law is of value not only in Great Britain but also in this country and in any other country having a common-law background. No serious student of the common law can afford to overlook it.

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THORELLI, H. B. *The Federal Antitrust Policy, Origination of an American Tradition.* Baltimore: The Johns Hopkins Press, 1955. Pp. xvi, 658.

STELZER, I. M. *Selected Antitrust Cases, Landmark Decisions in Federal Antitrust.* Homewood, Ill.: Richard D. Irwin, Inc., 1955. Pp. viii, 210.

HAUSSMANN, F. *Das Dilemma eines deutschen Antitrustgesetzes.* Bern: Stämpfli & Cie., 1955. Pp. 75.

HAUSSMANN, F. *Public utilities und gemischtwirtschaftliche Unternehmungen in nationaler und internationaler Sicht.* Bern: Stämpfli & Cie., 1955. Pp. 118.

1. Mr. Thorelli's book is a comprehensive study of the era that created and formed the American antitrust policy. The historical treatment of the period between 1865 and 1903 regarding the development of antitrust law is viewed rather from the standpoint of a political scientist than from that of a lawyer. The economic, social, constitutional, and political background of the Sherman Act of 1890, and the corresponding trends under the enacted law, are discussed

with equal thoroughness with the common law background and the judicial interpretation of the Act. The book presents much pioneering research, based upon the files of the Department of Justice, and other sources. All cases, public and private, decided under the Act between 1890 and 1903 are reviewed.

The reason why the study does not extend beyond the year 1903 is explained by the author. The year 1903 marks the end of a six-year period of large scale trust formation, and the beginning of a better organized governmental antitrust policy under President Theodore Roosevelt (p. 3). There are certainly many questions that make it worthwhile to cover the said period with historical studies, such as the disputed authorship of the Sherman Act (pp. 210 *et seq.*), the relatively high share of private litigation under the Act (pp. 477 *et seq.*, 597), and many other so far little known features of antitrust history. The reader joins in the hope expressed by Mr. Corvin D. Edwards in his foreword that the author will continue his research to write a companion volume on the later development of antitrust law.

2. Mr. Stelzer's casebook, on the other hand, turns to the up-to-date practice under the antitrust laws. His purpose is to provide students in economics, government, and business administration with an opportunity to obtain a clear understanding of the American antitrust laws. It will be permitted to add another purpose of the book for which it seems to be no less suitable. This selection of "landmark decisions" is an excellent introduction to the antitrust law in its present stage of development for the English-reading foreign law student. Thus, it should find use in comparative law libraries that do not want or cannot afford to specialize in this field.

The cases are carefully chosen and condensed to their essentials. The short notes at the openings of the chapters may serve as first hints to the understanding of the following cases, and as outlines for those readers who wish to view the whole field of law in one context. This book may be recommended as a concentrated, correctly drawn survey of the American antitrust law, to students of comparative law included.

3. A practical application of comparative antitrust law is Mr. Haussmann's *Dilemma eines deutschen Antitrustgesetzes* (Dilemma of a German Antitrust Law). The existing German antitrust ("decartelization") legislation was enacted in 1947 by the military occupational authorities of the three Western allied powers. As the German federal parliament refrained from enacting a Government bill of 1949 that was to replace and succeed the temporary military regulations, these in 1955 became German federal law and are therefore still the German law of trade restraints.

The pros and cons of the government bill of 1949, renewed in 1953, forms the subject of Mr. Haussmann's informative little book. He criticizes both the efforts of the industrial lobby to "mitigate" the Government bill, and the competitive purism of the "neoliberalist" school of economics. Instead, he suggests adaptation of the "uncomplicated, well understood basic ideas of the Sherman Act," and utilization of American experiences under this Act (p. 41). A collection of research material on relevant public opinion concludes the book.

4. Another interesting approach to the social control of industry is offered by Mr. Haussmann in his comparative study on public utilities. He compares public utilities under American, English, German, Swiss, French, and Italian law. Mr. Haussmann would see antitrust policy completed by a properly designed governmental public utility control. This is certainly a constructive idea. Yet, to replace antitrust laws by forming public utilities in order to control them may prove a treacherous way in the social control of industry because a public utility control must necessarily be less rigid in the protection of competition than the usual antitrust law. Therefore, if public utilities were to replace antitrust prohibitions, the industrial trend might be to restrict competition under the shield of a "public utility" organization. Mr. Haussmann's proposals do not exclude this interpretation. But, in any event, he has contributed a valuable comparative study to the understanding of the legal and political correlations of antitrust and public utility control.

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DE JUGLART, M. *La Convention de Rome du 7 Octobre 1952 relative aux dommages causés par les aéronefs aux tiers à la surface.* Paris: Les Editions Inter-Nationales, 1956. Pp. 223.

The New Rome Convention of 1952 on damage caused by foreign aircraft to third parties on the surface is destined to become one of the most important instruments of international air law (provided that there will be enough ratifications), and its provisions relating to execution and enforceability deserve the full attention of every student who is generally interested in the difficulties and possibilities of international unification of private law.

Professor de Juglart of Bordeaux is one of the leading authorities on the subject, and the present treatise will certainly be widely used in the years to come. It is appropriately divided into two parts, the first of which deals with the problems of substantive law, with the principles of absolute, limited, and guaranteed liability, which form the basis of the Convention, whereas the second part is dedicated to the procedural dispositions relating to jurisdiction, statutes of limitation, execution, etc.

Professor Mazeaud has written a preface which deserves some attention from a general point of view because of some caustic remarks as to the disproportion between the Convention itself and the enormous efforts bestowed upon its preparation: "Vingt années de congrès, de séances de commissions et sous-commissions, de débats, de rapports, de projets et contre-projets, de voyages aux quatre coins du Monde: Londres 1927, Budapest 1930, Stockholm 1932, Rome 1933, La Haye 1935, Bruxelles 1938, Bruxelles 1947, Montréal 1950, Taormina 1950, Paris 1950, Mexico 1951, Rome enfin 1952—et la liste n'est sans doute ni complète, ni achevée—tout cela pour rédiger 39 articles qu'un spécialiste aurait sans doute pu mettre sur pieds en quelques jours. Disons-le tout nettement, il faut en finir avec ces méthodes de travail." Strong language

indeed, and it is no wonder that some of those who took a leading part in these efforts have not been pleased at all by this fierce attack (*cf.* Justice Alten in 1956 Zeitschrift für Luftrecht 236). The truth, however, is as usual somewhere between, and leaving aside the question of the expense of time and money involved, the situation could be presented somewhat along the following lines: On the one hand, one has to acknowledge that the preparatory work done for the Convention has been of a quite admirable thoroughness and quality, particularly in its last phases—on the other hand, however, there is proof enough that the Legal Committee of ICAO and the final Conference at Rome were as far from sufficiently recognizing and mastering the procedural and technical aspects and problems of private law unification as any preceding or corresponding bodies. Thus, the minutes and documents of the Legal Committee and of the Conference, with a host of good as well as of bad examples in point, provide material of invaluable value not only for the restricted ambit of international air law, but above all for international law in general.

Professor de Juglart's comprehensive study may serve as an admirably lucid introduction into every aspect of the Convention. It is, however, rather a pity that a work which is in its substance as important and as fundamental as the present, should be so careless in its bibliographical apparatus, which has gone very much astray by confusion of languages, by misprints, and miscitations.

WERNER GULDIMANN

WASSENBERGH, H. A. *Post-War International Civil Aviation Policy and the Law of the Air*. The Hague: Martinus Nijhoff, 1957. Pp. 180.

During and after World War II, aviation has definitely come out of its infancy's leading strings and has gained a decisive influence on the military as well as the economic potential of most countries. In the same time, civil aviation—economically and operationally—has integrated into a world-wide network of regular services, and the traffic flow over the air lanes of the world is in not a few regions already beginning to outgrow surface traffic. Air traffic rights have thus become a bargaining object of no mean value, civil aviation policy an acknowledged sector of government activity, and international air law an important part of international law in general.

International civil aviation policy and international air law, their development, interdependence, and mutual relations form the subject-matter of the present study. A general presentation of the problems which arise in this field is in itself of some merit, and the author's analysis of historical developments and basic trends is a real advance.

Some weak points should however not be overlooked. The introductory mottos put at the head of every single chapter in their somewhat affected generality resemble the mannerism of certain detective fiction writers: e. g., "*Omnes ut universi* (Post-glossator)" introducing Part II, expresses as much as would "Facts are facts (Chinese)." The disposition is somewhat loose, and the *principium divisionis* of the main parts and chapters is rarely recognizable. Of the

two basic conceptions of sovereignty, and of aviation policy on which the whole study rests, neither is presented in sufficient clearness and straightness.

With regard to sovereignty, civil aviation is one of the fields in which the present status of the problem—characterized mainly by the decline of absolute nationalism, accompanied by rearguard actions fought by so-called young nations—is most strikingly illuminated by facts and figures. It is therefore rather regrettable that the present study does not more fully elaborate the problems arising out of the sovereignty conception.

With regard to the problems of aviation policy, the author stresses the international function of civil air traffic and the basic principle of a healthy and fair competition, "the most fruitful 'aviation policy means' of promoting the aim common to all States, the further development of international civil air traffic" (p. 20). On the other hand, he quotes the customary definition of aviation policy—based upon purely national points of view—which in his opinion explains why the development of aviation since the Chicago Conference of 1944 has been determined by bilateralism (p. 15). Now, let alone the somewhat special conditions of international civil aviation in the Netherlands by which the author clearly has been influenced, it is rather difficult to define a "healthy and fair competition," and it is rather misleading to envisage the further development of civil aviation as an aim in itself. In order to grasp the realities as they are and to determine the real objects of aviation policy, the following considerations are submitted as starting points by the present writer:

There is as yet no international civil aviation policy pursued by an international agency, but rather a multitude of more or less co-ordinated civil aviation policies of sovereign states, even within the framework of ICAO.

Civil aviation is not an end in itself, but rather a part of transportation industry in general and a part of economy in general, and civil aviation policy must therefore be subordinated to commercial policy in general.

As an economic activity, civil aviation must be subject to the general economic command: to aim at the greatest profit at the least expenditure.

In applying this command, aviation policy must not consider civil aviation purely in itself, but rather in its use for and its effects on economy in general, and with regard not primarily to the immediate future, but rather to long-term developments.

Other than purely economic—such as military or political—interests are, however, affected by aviation policy, and due regard must be paid to them as well.

Summing up, the present study has definite merits, above all in stating the problem and in analyzing historical developments and present trends; the treatment of the dogmatic questions, while not completely satisfactory, contains elements which will be of good use for further explorations in the same field.

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BERMAN, H. J.—KERNER, M. *Soviet Military Law and Administration.* Cambridge: Harvard University Press, 1955. Pp. xiv, 208.

A Russian casebook published in 1946 contains a Soviet Supreme Court decision in the case of a Russian soldier who was tried for making "counter-revolutionary utterances" in violation of the Soviet Criminal Code. The court acquitted the accused on the grounds of an absence of the requisite criminal intent. Another official report of the same case, this one published in 1948, makes some remarkable changes in the text of the decision, some portions being excised or altered with no indication being given of the changes. What had happened, of course, was that during the two years which intervened between publication of the two reports the party line as to what constituted the offense of "counterrevolutionary utterances" had changed and the absent intent was no longer grounds for acquittal under the original charge. Changes in case law as the result of subsequent decisions or legislation are not new to us, but what is significant here is that the Russians actually distorted the language of the original published decision in order to conform it to a later view of the issue involved.

The foregoing illustration points up the greatest shortcoming of Soviet military law: cases involving political offenses are determined by the official, i. e. Communist Party, view of the offense at the time of the trial, and there are no holds barred in the courts in achieving the desired result. This is based on the Soviet premise that political organs do, and should, exert their influence upon every phase of Soviet life including military activities and the judiciary. The very statutes which define political crimes are ambiguous—probably intentionally so. An act is "counter-revolutionary" if it is "directed toward the . . . weakening of the authority" of the Soviet government or even "of the basic economic, political, and national conquests of the proletarian revolution"; treason is any act which "damages the military might of the USSR"; and "propaganda or agitation" which "appeals to a weakening" of Soviet authority is a counterrevolutionary crime.

Procedural aspects of trials for political offenses (such as espionage, subversion, terrorist acts, and treason) leave even more to be desired. The court may try the case *in camera*, may refuse to call witnesses for the accused, may receive testimony of witnesses not present in court, may use unpublished evidence in reaching its verdict, and may cut off argument for the accused or deny him counsel entirely. Explicit provision is made for trial "without the participation of the accused" and with no right of appeal. Procedural norms in such cases are observed only in "demonstration trials" where the fate of the accused is decided beforehand and the trial is held exclusively for propaganda purposes.

Political crimes probably consitute a small percentage of the total number of cases tried in military courts, however, and with respect to most other offenses the Soviet military code does not differ greatly from military codes of most other nations. The Russian commanders are apparently troubled with the same type of military offenders as are all other military commanders. Their

code contains the usual provisions relating to military crimes such as desertion, absence without leave, failure to report punctually, evasion of service duties, insubordination, breach of rules of sentry, etc. The maximum authorized punishments are somewhat more severe than under the United States military code. For example, absence without leave from two to twenty-four hours is punishable by sentence to a disciplinary battalion from two months to two years in time of peace and deprivation of freedom from three to five years in time of war; absence without leave for more than twenty-four hours (desertion) is punishable by deprivation of freedom from five to ten years in time of peace, and death by shooting plus confiscation of property in time of war. Under the United States code, by way of contrast, confinement authorized for absence without leave ranges from one month in the case of an absence for three days or less to one year in the case of an absence for more than thirty days. (Desertion, of course, carries a more severe penalty but the prosecution must show an intent to remain away permanently regardless of the length of absence.) A unique punitive provision of the Soviet code is that which states that innocent members of a serviceman's family may be punished by "deportation to remote regions of Siberia" if he flees across the frontier.

In cases of nonpolitical offenses, the Soviet code provides for many of the due process protections which are characteristic of Western law, such as the right to a public trial, the presumption of innocence, the right to present both sides of the case and to examine prosecution witnesses in open court, and the right to be represented by counsel and to appeal to a higher court. Whether these rights are observed in practice is another question.

One of the most interesting aspects of Soviet military law is the gradual return to traditional concepts of military authority and discipline. Originally, the communist theory of a classless society was applied to the military forces as well as civilians. Officers were elected, and their powers were limited; all ranks, insignia, and decorations were abolished; enlisted men were permitted to sit on courts-martial, and a general spirit of camaraderie was encouraged. The 1925 code is critical of "the armies of monarchies and bourgeois capitalist republics" where "discipline is based on the class subjugation of the rank and file to the feudal-bourgeois officers' corps." Discipline in the Red Army, on the other hand, was to be based on "the conscious understanding by all servicemen of the aims and importance of the Workers' and Peasants' Red Army." The Russians apparently discovered, however, that an army must be run as an army, that discipline and a hierarchy of commanders are essential to an operational military establishment, and that the classless society theory simply does not work on the battlefield. The authority of commanding officers has been increased to the point where any order of a commander to a subordinate, whether or not given in the course of service, is unconditionally binding. (Under the United States military law, an essential element of proof is that the superior's order must relate to military duty and must be within the authority of the superior.) The latest Russian code completely abandons the

idea of a military discipline peculiar to communist states, and all of the former distinctions between rank, including special military schools for the sons of officers, have now been re-established.

This book is a comprehensive and well-written summary and analysis of military law in the Soviet Union. The authors are eminently qualified in the field, Mr. Berman being a Professor of Law in the Harvard Law School and the author of several other books on Russian law, and Mr. Kerner being a former Czech lawyer who served with the Czech forces in Russia during World War II. The text is thoroughly documented with reference to Soviet statutes and legal authorities, but the difficulty, as the authors themselves candidly admit, is that the test of any system of justice is not how it is set forth in law books, but how it is practiced in law courts. Unfortunately, it is hard to see through the iron curtain, and we have very little data on the actual administration of justice in the Soviet courts. The authors' conclusion, based on their studies and personal experience, is that the Soviet leaders are seeking to use law to inculcate rationality into the social order generally, including the military system, but the transforming power of the law is seriously diminished by the fact that "the leadership remains the master, rather than the servant, of the legal order." We are still philosophies apart.

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LIVINGSTON, WILLIAM S. *Federalism and Constitutional Change.* Oxford: Clarendon Press, 1956. Pp. x, 380.

This book is a thorough comparison of the Canadian, Australian, Swiss, and United States constitutions, focussed on the amending process; a sketchy survey of the same problem in the Union of South Africa, the United Kingdom, Northern Ireland, New Zealand, Germany, and Latin America; and two theoretical chapters on the character of federalism and its relation to constitutional change.

Throughout the book a stimulating and challenging sociological thesis is vindicated: the essential nature of federalism is sought for, not in legal and constitutional terminology, but in economic, social, political, cultural forces that have made the outward forms of federalism necessary (1). This is a big order, and it may be asked whether "the single medium of constitutional amendment" is best suited to demonstrate the thesis, of all the manifold ways of constitutional change. The title of the book is a somewhat wide coat for its content, while "formal amendment of the constitution" is a less conspicuous illustration of the sociological thesis than custom and convention or judicial decisions.

The author is so much convinced of the truth that it is not the wording of a clause, not the form that counts, but the way in which it operates depending on the nature of diversities in the society and the attitudes of the people towards the value of those diversities (317), that the usefulness of his very heuristic principle is endangered by his appeal from what is controllable to what is less

controllable. For instance, the fact that similar amending procedures in Australia and Switzerland have produced very different results—very few amendments in the first case and a great number in the second—while dissimilar procedures in Australia and the United States have produced very similar results, is attributed to different cultural traditions between the first pair of countries and more nearly alike cultural and historical backgrounds in the second pair. The same disparity of "clauses and cultures" is maintained as to the very similar amendment provisions in the Mexican and the United States constitutions, which have operated in vastly different ways (303). The problem of causation being left unexplained, this amounts to posing a Montesquieuean problem rather than solving it.

The sociological thesis in stressing the factors underlying the institutional form seems to be in open contradiction to the reason by which the author tries to justify his concentration on a single way of constitutional change: formal constitutional amendment. His reason for doing so is that formal amendment is "superior" to all other kinds of constitutional change "and may be employed to transcend or repudiate any change that may be brought about through these other means" (13) and, again, "it may override any of the others and none of the others may override it" (14). This is the language of the formalist, not exactly verified by the ups and downs of the Prohibition Amendment.

The focal point of interest in this volume is whether a federal system requires a particular procedure of constitutional amendment and, conversely, whether such procedure may identify a particular state as federal? The author finds that no precise form is necessary, while there is great similarity in the principle of state consultation.

The final criterion is found in a hypothetical spectrum extending "from the highly unified society on the one hand to the highly diversified on the other." Towards the latter end of this spectrum, heterogeneity will require instrumentalities for the articulation and protection of the diversities. The amending process is almost inevitably found, "since it is the control of this element that ultimately determines the nature of the constitutional structure." The important qualification on this result, which in itself sounds quite formalistic, is that "the instrumentality may not appear as a clause in the constitution; it may be only a manner of doing things or an attitude towards political questions." Thus the author tries to save something from both form and process by substituting a living form for the absent institutionalized form. "In Canada, Britain, and South Africa, the process is not institutionalized; in Canada, indeed, it is not even standardized. In Australia, Switzerland, and the United States, it is made into a formal constitutional provision requiring special extraordinary majorities, and so on. The forms differ greatly, but in fact the several countries work through processes that are similar." (301–302).

But Canada, Britain, and South Africa are also enumerated among countries "that are not ordinarily thought to have federal governments" (300).

The intriguing problem the author has formulated cannot be regarded as

solved by his present volume. Nevertheless, by demonstrating that ostensibly federal states operate as if they were unitary, while professedly unitary states operate as if they were federal, he put his finger on a valid problem, which still is the crux of political as well as legal theory: the interrelation between substance and process. To have exemplified this general problem in a challenging manner and in a matter of paramount legal and political interest may be regarded as the chief merit of this stimulating book.

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RUMPF, H. *Regierungsakte im Rechtsstaat*. Bonn: L. Röhrscheid, 1955. Pp. 160.

In this work, the author, a lecturer at the University of Heidelberg and counsel with the Foreign Office of the Federal Republic, investigates and explains the concept of "Act of State" (*Regierungsakt*): the first chapter of the book, entitled *Politik und Recht als Problem*, is concerned with the general aspects of the topic, while the second chapter, *Actes de Gouvernement in der französischen Rechtsprechung*, and the third and last *Prärogative und Acts of State im englischen Recht* treat more specific aspects in French and English law.

In defining the concept *Regierungsakt*, the author follows Willibalt Appelt who describes it as an act of eminent political importance, but not justiciable by the courts of the state, with common or administrative, constitutional or criminal jurisdiction. This definition, quite acceptable and seemingly harmless at first blush, becomes an all-important weapon in the hands of certain jurists: the next conclusion is the almost logical duty of any such court to dismiss any suit against war criminals of another country, since the incriminated actions usually are to be traced back to *Regierungsakte* outside the jurisdiction of the criminals' national courts. The sovereign character of a defeated country, even in case of unconditional surrender, implies the right to determine which acts of its officers and agents are justiciable and which are not. The author promptly points out the *confusion* between *per*secution and *pro*secution (p. 22, 23), suggesting that justice never more miscarried than when the major and minor war criminals faced their judges after the termination of the second world war. He concludes, after reviewing the "*zahllos*" war crimes trials in France, Germany, and Austria as well as at Nuremberg, that even any trial for high treason before an independent court of law in a liberal *Rechtsstaat* must be political, where justice yields to power. Democracy apparently is called upon to differentiate between justice and power, to side with justice, and to permit its enemies to subdue democracy and take over power. The author does not consider that a *Rechtsstaat* may become an *état criminel* and the entire legislation of such a state, issued with or without the consent of a parliament or Reichstag, lose its qualifying and justifying character. However, every reader will quite agree that in a *Rechtsstaat* acts of state tend to diminish in number and to increase in an authoritarian or near-authoritarian system of government.

The author deplores the influence that political majorities exercise in Germany on the administration of justice and criticizes Roosevelt, who is blamed for his attack on the Supreme Court after the Court had annulled certain laws of the New Deal (p. 27). Here the author, despite his erudition, does not reach the nucleus of the matter. While we may admit with Carl Schmitt that constitutional arguments are always political arguments, or with Kelsen that law is simply a system of formal sentences, hypothetical judgments stating certain possible presumptions envisaged by the lawgiver and consequently that jurisprudence must not be classified as a specific province in the realm of ethics, or with Max Weber that political activities denote striving for power and that there are in politics no differentiating criteria like Good and Bad, Beautiful or Ugly, Useful or Hurtful, but only Friend and Enemy, it must be made clear that, while justice as application of law deals with things static, politics is dynamic. The United States Supreme Court, in its relatively frequent reversals of long-held opinions, represents a dynamic element in the statics of the law. But as in parliamentary democracies of the western type—and Dr. Rumpf is by no means an advocate of any authoritarian system—politics influences the judicature, the high courts of bygone monarchies upheld, with modifications and concessions, the basic philosophies of the ruling classes. Inconvenient as it may sound, especially to German ears, in a parliamentary democracy parliament is a ruling and privileged body that will exercise its power just as did the Crown in former times. Perhaps, in the German case, the power of the president of the Federal Republic should be enlarged; the author removes any possible doubt that the American constitution represents a masterwork of checks and balances and is still, despite certain admitted weaknesses, a "government by lawsuit" and therefore of justice and equity.

In England as well as in France, the state is stronger and maintains that certain official acts are not justiciable. In France, *actes de gouvernement* are not defined by law, but the courts have developed an entire system of enumerable acts not subject to review by any court of law; these are: (1) all actions concerning the relationship between the government (cabinet) and parliament, e.g., convocation, adjournment, dissolution, filing of bills, etc.; (2) exercise of the right of pardon; (3) declaration of a state of siege, not however its execution; (4) *actes diplomatiques*, including acts of sovereignty in the colonies and protectorates; (5) certain acts in war; (6) acts in relationship to upholding discipline in the armed forces.

The author notes three types of explanation of *actes de gouvernement*: (a) the historical approach weighs the balance between the original *justice retenue*, cases decided directly by the head of the nation and eventually transferred to the *section du contentieux* of the *Conseil d'État*, and cases the *Conseil* refuses to hear (*non reçevoir*) in order to retain its power, as it were by self-limitation; (b) the teleological approach, e.g., the theory of *mobile politique*, seeks to differentiate between *acte de gouvernement* and the ordinary *acte administratif*: the literature never was able to establish clear definitions of the *acte de gouvernement*, since

essentially political actions of the government are discretionary; (c) the approach *ad rem* considers the nature of the individual action: this is doubtless the weakest explanation, although based on a formal criterion (Duguit) that acts of government as a political organ and not as an administrative agency are not justiciable.

In British usage, *act of state* has a narrower meaning than the French term and rather points to foreign policy. However, there is one supreme agency which is actually above the law and beyond the courts of law: Parliament. Parliament can do everything "but make a woman a man and a man a woman" (quoted from Dicey, p. 98).

Until 1947 the principle *The King can do no wrong* prevailed. No administrative law in the continental, French sense existed. A resident of the United Kingdom who had a claim against the executive could file a *petition of right* with the Home Secretary that the Crown submit the claim to trial in court; alternatively, a lawsuit lay against the public employee for indemnification and, if judgment was recovered against the employee, the latter customarily, but not necessarily, was granted redress by the Treasury *à titre de grâce*. Since the Crown Proceedings Act 1947, the Crown, being not the individual sovereign but the executive branch of the government, may be sued not only as party to a contract but also for indemnification of damages caused by unlawful acts of public employees. Persons in the service of the armed forces are not granted redress for damages suffered while in service; there can be no act of execution against the Crown. Finally, the executive branch still enjoys certain privileges as to deposition of evidence: the discretionary decision of a cabinet minister determines whether a judicial order to produce evidence, usually documents, should be refused in the higher interest of state. The Crown is thus still very much *domina litis*. However, Rumpf points out that an administrative judicial procedure as it is known in continental states is virtually unknown in the United Kingdom, as the functions of the *Conseil d'État* are exercised by the ordinary law courts.

Outside the jurisdiction of the courts are to be found the prerogatives of the Crown, which are divided (Blackstone, Hatschek, Anson) into two groups: (1) the so-called capacities or substantial prerogatives; (2) the genuine prerogatives. The first group includes the attributes of a monarch, not changed, but protected by constitutions everywhere: sanctity and inviolability of the sovereign's person, etc. The second includes privileges that essentially correspond to the French *actes de gouvernement*.

The author concludes that in the United Kingdom the area of political force, and thus of acts of state, is even wider than in France. The British system decides questions of law objectively, according to general binding norms; political questions, however, are judged from a subjective viewpoint of interest of the state, which is in a position of sovereignty (Dicey) or supremacy (Jennings). Reading of this highly instructive volume leaves the impression that the identity of the Crown with the parliamentary majority results in a certain lack of balancing checks: the preface contains a hint that Dr. Rumpf

later may present us with a study of *Regierungsakte* in the United States, which will be awaited with stimulated expectations.

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WALINE, M. *Droit Administratif*. Paris: Sirey, 1957 (7th edition). Pp. i–xii, 891.

FORKOSH, M. D. *A Treatise on Administrative Law*. Indianapolis: The Bobbs-Merrill Company, Inc., 1956. Pp. i–xiv, 856.

A doctor or a scientist, with the necessary linguistic knowledge, can open any foreign treatise in his specialty and find the answer to the particular problem in which he is interested. This is not true for the lawyer, who usually cannot understand what a specific chapter of a foreign legal treatise says unless he reads the volume from the beginning. Thus, there is no "comparative medicine" or "comparative chemistry," while there is such a thing as comparative law. Why is this?

An exercise like the reading together of the treatises under review reminds us of the importance of the role played by history in the formation of legal institutions and shows how for historical reasons, specific to every country, systems and procedures directed towards similar objectives (and studied in treatises bearing exactly the same name) take different forms.

The present system of French administrative law, for instance,[1] is the result of a slow evolution during the 19th century of principles and institutions adopted by the French Revolution as a reaction to the practices of l'Ancien Regime.

Among the most unpopular institutions of the pre-Revolutionary period were *les parlements*. The members of these so-called sovereign courts had no fixed salary, their professional income being dependent upon the number and importance of the cases handled and tried by them. Due to this pecuniary interest of their members, *les parlements* were naturally very jealous of their jurisdiction and waged an uninterrupted war against any jurisdictional grants by the King to his *intendants de police, de justice, et finance* in administrative or fiscal matters. In order to prevent similar harassment of the new administration, the French Revolution proclaimed: "The judicial functions are distinct and will always remain separated from the administrative functions; under sanction of dismissal, the judges are prohibited from interfering in any way with the operations of the administrative bodies" (art. 13, *titre* II, Law of August 16/24, 1790). This provision was completed by a later law (Fructidor 16, *An* III), in the following terms: "Judges cannot interfere with administrative functions and cannot summon before them members of the administration for reasons con-

[1] The "due process of law" clause, a key concept of American administrative law, represents a long evolution starting with Magna Charta, if not earlier. For bibliographical references: Administrative Law, Gellhorn and Byse, The Foundation Press, Inc. 1954, p. 718 ff.; see also Forkosh p. 23, note 14.

nected with their functions. Tribunals are warned again that they are prohibited from taking cognizance of any kind of administrative acts." The separation of the administrative and judicial activities—a principle corollary to Montesquieu's separation of the three powers—however left persons injured by a decision or fault of the administration without any other recourse than a complaint addressed to the administration itself. Realizing the weakness of such a system of submitting the grievances of an injured person to the very author of the illegal act or to his hierarchical superiors, Napoleon created an administrative jurisdiction represented by *les conseils de préfecture* (special administrative tribunals with limited jurisdiction) and *le Conseil d'État*.

Designed to be the legal advisor of the government, the *Conseil d'État* at the beginning had a role which, as Professor Waline suggests, was comparable to that of the legal department of a big private firm. It examined the grievances against an administrative decision addressed by the citizens to the head of the state and prepared an answer—rejecting the complaint, according an indemnity, or annulling the decision taken by the administration—which the First Consul had to sign. Within some seventy years, however, the *Conseil d'État* rose from its position of legal advisor to that of an independent administrative tribunal. The theory according to which the *Conseil d'État* exercised a mere *justice retenue* (retained justice), its function being only to recommend to the head of the state the solutions to be given to various claims against the administration became a fiction since practically all the recommendations of the *Conseil* were accepted by the head of the state. A statute of May 24, 1872, finally recognized that the *Conseil* was a true court, not limited to advice, which itself should render decision after a proper judicial procedure, having *la justice déléguée*.[2]

[2] The distribution of justice was one of the sovereign attributions of the head of the state. He did delegate his powers to the judicial courts, but in administrative matters he had "retained" his rights, the decision being reserved to him until 1872.

The empirical character of the evolution at the end of which France has been endowed with a double order of jurisdiction—judicial (justices of peace, *tribunaux*, *Cours d'Appel*, *Cour de Cassation*) and administrative (administrative tribunals, *Conseil d'État*)—is particularly noteworthy for a country usually associated with the geometrical logic which presides over the establishment of so many of its other institutions. In 1790, it was simply decided that administrative matters should be taken away from the cognizance of the judicial courts. Since denials of justice followed, little by little, the need was felt for certain guarantees protecting the rights of individuals against the administration. These guarantees (statutes of 1806, 1831, and 1845, mainly concerning matters of procedure) assumed a jurisdictional form so that in 1872 the jurisdictional character of the *Conseil d'État* was officially recognized (*cf.* Waline, p. 31, No. 40). The growth of legal institutions is slow, determined by historical and political factors and helped by the way in which the institutions themselves succeed in asserting their role whenever the need is felt in the constitutional life of the nation. Both for the jurist and for the political scientist, there are probably few institutions with a more interesting history than that of the *Conseil d'État* and of the means by the use of which it became what it is today, the guardian of French civil liberties. While it is true, generally, that it is the nation that molds its institutions, the *Conseil d'État* illustrates the converse proposition, often confirmed, that institutions can have a very important impact upon the constitutional life of a nation.

Today, the decisions of the Council are rendered in the name of the French people, in imperative form ("The government will pay . . ." or ". . . Such Act is annulled. . . .") exactly as those of the judicial courts and are, of course, *res judicata*.

This duality of jurisdictions—judicial and administrative—explains the existence of a French administrative law, autonomous in substance and with procedural rules of its own, and its judge-made character, a peculiar phenomenon in a country with a civil-law system. It can be said indeed that French administrative law is the creation of the *Conseil d'État*. While the ordinary courts have had to apply the provisions of the Napoleonic codes and have been guided in all their decisions by the general principles set forth by the Civil Code, the Conseil d'Êtat, says Mr. Waline, "was left on its own, to its sense of justice on the one hand and to the exigencies of the general interest on the other hand, without, more often than not, any guide in the statutes" (page 19, No. 23).

However, for the American lawyer, the existence of separate administrative jurisdiction is not the only distinguishing characteristic of the French system of administrative law. The very substance of French administrative law is also different from that of the United States, at least as this is reflected in the content of the second treatise under review. Under the heading: "Definition of Administrative law" (No. 2), after observing that "Administrative law can be defined, compared, distinguished and otherwise introduced to the student,"[3] Mr. Forkosh divides administrative law into internal law which is made or created by the agencies themselves, and external law, "which impinges upon, governs, and restricts agencies and is found in constitutional, legislative, executive and judicial pronouncements." With respect to the former, the author remarks that "it is physically impossible to cover the internal functions and procedural workings of each and every administrator, board, agency, commission, licensor, etc. . . . in every municipality, county, state and federal department" (No. 4). Indeed, an agency's "practices and even policies may vary biennially or quadriennially if not annually." For these reasons, the author devotes attention chiefly to the "external law," which, in the last instance, is built around the two constitutional law concepts of delegation of powers (see: Part II, pp. 101–202) and due process (Nos. 26–35) and Part IV and V, pp. 547–770).

In comparison, the sphere of French administrative law appears to be much larger. Also, its autonomy, as an independent branch of the law, is disputed

[3] It is to be regretted that the author does not go further than this announcement: he does not make the comparisons that he implies are possible, nor limit the field of administrative law so as to distinguish it from other branches of law. He promises (*eod. loco*) that from his study "will evolve a practical working definition which can be utilized here and elsewhere" but, alas!, he does not keep his word. It is also regrettable that a volume "designed primarily for the uninitiated" (p. v) should assume that the reader knows what "agencies" (p. 2) and "alphabetical agencies" (p. 5) are; Part I, entitled "A Preliminary Outline of Administrative Law" offered an opportunity to introduce the "uninitiated" to a systematic presentation of the federal agencies, their activities, and the reasons for which they were created.

neither by constitutional law, as in the United States, nor by civil law, as could have been the case in France. The object of French administrative law is (1) to describe or determine the organization and the attributions of the administration and its organs and (2) to study the rules which govern the relations between the administration and its organs with the public (*cf.* Waline, No. 2, page 2). France not being a federal country, French constitutional law does not encounter any of the problems concerning the relationship between the federal government and the different states, which are of special interest to constitutional law in this country, nor is such elaborate attention given to the topics raised by the amendments to the United States Constitution. Consequently, French constitutional law treatises take a more "descriptive" approach, chiefly limited to the study of the organization and functioning of the three branches of government, comparable to what is treated in American treatises on government. In France, the description of the status of the various organs of the state, collective (state, *département*, *commune*, etc.) or individual (*préfet*, mayor, minister, etc.), regarded as "administrative persons" (see Waline, pp. 224–379) is left to administrative law, which also includes, as its most important object, the problem of the legality of all acts of the administration and its organs.

While the distinction between French administrative and constitutional law is thus undisputed, the existence of an autonomous administrative law in the fields of contracts and civil responsibility seems paradoxical, since these are dealt with by the *Code Napoléon* and as such constitute an integral part of the *droit civil*. When as a result of a contract or a tort the administration becomes indebted to a private person, why not apply the civil-law principles? Of course, the principle of separation between administrative and judicial activities prohibits the judiciary from taking cognizance of cases which might involve condemnation of the administration; but why should not the provisions of the Civil Code apply in French administrative tribunals? As far as civil responsibility is concerned, this is a matter where "a page of history is worth a volume of logic."[4] The existence in France of a dual regime in this field—one for private persons and another for the state and its organs—goes back to a celebrated decision (*l'arrêt Blanco*) in 1873 of the *Tribunal des Conflits*,[5] which defines the respective jurisdictions of the judicial and administrative tribunals in dubious cases. In this case, the *Tribunal des Conflits* observed that "the responsibility which may fall upon the state for damages caused to private persons by agents employed by the state in its public services cannot be governed by the *Conseil d'État*."[6] The Conseil found itself in a dilemma. According

[4] Holmes, in New York Trust Co. v. Eisner (1921), quoted by Forkosh, p. 8.

[5] This, the highest court in France, was created by the statute of May 24, 1872, and is composed of three members of the *Cour de Cassation* and three members of the *Conseil d'État*, who elect two additional members, usually a fourth member of the *Cour de Cassation* and a fourth member of the *Conseil d' État*. Until 1950, the *Tribunal des Conflits* rendered an average of only twelve decisions a year.

[6] The dual regime in matters of civil responsibility was undoubtedly established by the *Tribunal des Conflits* in order to give a preferential treatment to the state, whose important

to the decision of the *Tribunal des Conflits*, the provisions of the Civil Code did not govern the civil responsibility of the administration. Without any statutory guide, the *Conseil* was therefore obliged to create its own rules in the cases following *l'arrêt Blanco*. However, according to article 5 of the Civil Code, expressing one of the fundamental laws of the whole French legal system, the *Conseil* was prohibited from rendering *des arrêts de règlements*, as the decisions of general application given by the old *Parlements* were called.[7] The *Conseil d'État* circumvented this interdiction by rendering what French jurists call "*arrêts de principe*," limited to the specific cases in which they were pronounced. As the dicta in these decisions are reproduced in subsequent cases of similar nature, the legal doctrine of the *Conseil* has been consistently maintained in a manner closely resembling the effect given to "precedents" by American courts.

Having successfully met the challenge in the field of civil responsibility, the *Conseil d'État* was prepared to modify the law of contracts provided by the Civil Code when changing economic circumstances made such modifications necessary.[8] Both in the field of civil responsibility and in that of administrative contracts, therefore, an autonomous law was created outside the *droit civil*.

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services to the public, as stated in *l'arrêt Blanco* written by David (see Waline, p. 9), were in fulfillment of a duty and, consequently, could not be subjected to the same provisions applicable to faults committed by private persons acting on their own volition and in their own interest. However, seen in historical perspective (*cf.* Waline, No. 14), *l'arrêt Blanco* represented an important step forward in the effort to substitute responsibility of the state for the old principle of irresponsibility (the sovereign can do no wrong). Many French contemporary authors believe that a dual regime of responsibility is no longer justified. But Professor Waline observes (p. 12 and Nos. 1090–1362, see especially No. 1267: Responsibility without fault, Comparison with *Droit Civil*, p. 688 ff.) that the liberal doctrine adopted by the *Conseil d'État* in the decisions following *l'arrêt Blanco* created a set of rules which, in many respects, impose a stricter liability on the state and its organs than those of the Civil Code. Today, says Mr. Waline, an autonomous administrative law in the field of civil responsibility finds justification in the advantages it offers not to the administration but to the victims, private individuals (p. 13).

[7] For a summary legislative history of article 5 of the Civil Code, see the writer's article, "Guided Tour into a Civil-Law Library," (1957) Michigan Law Review.

[8] In his Introduction (Nos. 18–20), Mr. Waline mentions three typical instances where the *Conseil* felt it was practically impossible to apply the provisions of the Civil Code to contractual relations between the state and its organs and private persons. In Gaz de Deville-les-Rouen (S.1902.3.17), had the principles of the Civil Code been respected, a great number of French counties might have been left without electricity to this day. During the second third of the 19th century, many *communes* had signed contracts of concession (some for 99 years) for the lighting of dwellings and public highways with different gas companies. When, later on, these companies refused to install electricity, many cities entered into new agreements with electrical companies. The gas companies sued for damages and the *Conseil d'État* upheld their claims on the basis of the contractual stipulations, written clearly in their favor. After a certain period of time, the situation becoming intolerable, the *Conseil d'État* reversed itself on the ground that the privilege granted to the companies by their contracts was a mere right of preference which upon the refusal of the gas companies to install electricity freed the cities and counties of their contractual obligations and entitled them to address themselves to other companies for electricity. In Tramways de Marseille (S.1916.3.1, concl. Leon

In Professor Waline's book civil responsibility receives extensive treatment (Part V, pp. 611–735), while 70 pages are devoted to a comprehensive general theory on administrative contracts.[9] Also, the author gives "summary notions" to the police power, the public services (pp. 565–607), and the status of *les agents publics* (pp. 739–792). The content follows the new program[10] of the French law schools (December 29, 1954) which reserves more detailed study of the status of the public function, of administrative contracts, and of the general theory of the public services to the curriculum of the fourth year for those students specializing in public law.

Designed as a textbook for the second year of law school, Mr. Waline's work is, however, more than an excellent manual, which, with a sure hand, introduces the student into the intricacies of a subject so different, in substance and approach, from other branches of French law. Despite the modesty of its title—*Droit Administratif*—the volume is a treatise, written with clarity and precision, and making a complete introductory exposé of the different topics of French administrative law with all the authority of Professor Waline's learning and extensive academic experience. Abundant French bibliographical references are listed for each chapter, and there are comprehensive lists of comparative legal studies (treatises, articles, etc.), written in French, on the administrative systems of thirty-four different countries. Besides an alphabetical index, the work includes an index of decisions, a feature, in French legal books, always welcomed by Anglo-American readers, even when the index is limited to the leading cases.

Unfair as it may be to compare Mr. Forkosh's recently issued treatise with

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Blum), a street car company refused to comply with a decree of the *préfet* asking the company to provide additional cars for a certain line. As a consequence of the growth of population in a particular section of the city of Marseilles, the very few cars provided by the contract at the time of the signature became completely insufficient, were always overcrowded, and many accidents occurred. The company based its refusal upon article 1134 of the Civil Code, according to which the contract was the only law of the parties. But the *Conseil d'État* upheld the prefectorial order declaring that his police powers gave to the *préfet* the right to add to the contract in the interest of the security of the public and for the prevention of accidents. The company, specified the *Conseil*, was entitled to an indemnity only if it could prove actual damages. In Gaz de Bordeaux (S.1916.3.17), the *Conseil d'État* accepted the so-called *théorie de l'imprévision* which has always been rejected by the judicial courts as an heresy to the Civil Code. As a result of the First World War, the cost of production of natural gas became higher than the price provided in the contracts between the gas companies and their customers. The Civil Code obliged the gas companies to perform their obligations to the letter of the contract, since war was not considered as an act of God, *cas de force majeure*. The *Conseil*, nevertheless, decided that the subscribers—cities, *communes*, private persons—were legally obligated to pay an indemnity on account of *imprévision*, without which the companies, and indeed the population, would suffer disastrous consequences.

[9] A long *Titre* (pp. 131–232) on Administrative Jurisdictions deals with the French system of *contentieux administratif*, as modified by the decree of September 1953. The conditions of legality of unilateral administrative acts are treated in *Titre* I (pp. 383–492) of Part III.

[10] See 4 Am. J. Comp. Law 419 ff.

the 7th edition[11] of Mr. Waline's classic work, one cannot refrain from certain remarks. The difficulties facing an American author in writing "A Treatise on Administrative Law" are certainly real; such a treatise should include both "external" and "internal" administrative law, as the United States is a Federation, it must cover also federal as well as state law.

"In practising law for a quarter of a century and in teaching this subject to scores of classes," the author certainly saw the difficulties, but he has not really surmounted them. No attempt is made to present the law of the states, since this is "physically impossible" (see above). Why then not qualify his treatise to *federal* administrative law? As for the "internal" law of the federal agencies, despite assurance (No. 4, p. 4) that there will be "no omission of this important aspect of Administrative law," the illustrations in Chapter IX (pp. 205–238) and the additional material in Chapter XV scarcely represent serious effort to analyze systematically the law of the federal agencies. In general, the content of the volume (Chapter XV and Chapter XVII contain useful listings of types of orders and forms: petition for review, motion for preliminary injunction, etc.) and the form in which it was written[12] suggest that the author's main

[11] With the exception of the last pages (condemnation, public and private domain) the present edition was practically rewritten in its entirety, as a result of the above-mentioned reform of September 30, 1953, of the *contentieux administratif* and the introduction of the new curriculum in the French law schools. The first edition dates from 1936.

[12] The author often adopts the narrative form in the first person ("we diagrammed," "we footnoted," etc. . . . "as we shall see," "see sec. 194 where we take a stand," etc., etc.) assuming probably that such a form lends "smoothness in language" (p. vi) and satisfies "the layman's point of view" (*eod. loc.*). However, the familiarity of many expressions and paragraphs gives the impression of stenographic notes taken in the class room and not of a written text—

"*it ain't necessarily so*," p. 283, "A saying has it that two heads are better than one, although too many cooks may spoil the broth, but the law accepts the former when it considers administrative determinations," p. 302, ". . . what do we mean by standards? Suppose we have a dog, potentially vicious . . ." After 13 lines on the necessity of muzzling the dog, the author continues: ". . . while we do not mean to imply that agencies are potentially vicious animals . . . ," p. 104, etc., etc.

in striking contrast with the gratuitous usage of expressions as *cul de sac, largesse, sans appropos* (*sic*), etc. . . . with the hermetism of, for instance:

"The over-all type of analysis is illustrated by the A.P.A. which applies generally to all federal agencies brought under its sections, i.e., a horizontal approach; the particular type of analysis is illustrated by the Frankfurter attitude when teaching administrative law, i.e., a vertical approach. The practicing attorney, it is admitted, cannot but adopt the vertical study of the latter. . . ." (p. 71).

or footnotes like:

"The development of the Court of Exchequer, from 1236, illustrates this approach in the overlapping nonjudicial, and then judicial field" (p. 50).

given as reference to the following text:

". . . last week you desired to purchase a suit—how did you go about it, and what did you actually do? The average man doesn't just walk into the first clothing establishment, put on the first suit, willy nilly . . . . The eventual choice will occur after two or more suits are examined . . . . In other words, you as a *judge*, have examined all of the available facts and have made a decision thereon."

consideration in publishing his treatise was to provide law school students with a manual, limited to the exigencies of the curriculum and distinguished by two "practical features": the PATs—"bases of attacks upon the administrative proceeding" meant "to inoculate in the student the *feel* of his future professional life" (p. vi) and especially "a continuing diagram . . . which . . . culminates in a single-chart outline of the subject" (p. v). Unfortunately, "practical features" do not substitute for the indispensable effort required for a coherent and clear presentation of an admittedly difficult subject. In his oral exposition, a teacher may make good use of any pedagogical devices which he finds appropriate for the particular atmosphere of the classroom, and diagrams and charts may well have constituted an additional attraction in Professor Forkosh's lectures. But in the treatise under review, the author gives the impression that he became the prisoner of his own graphic inventiveness; he devotes many pages, at the beginning and at the end of each chapter, in explaining what the diagrams are supposed to illustrate. Even when justified by strictly pedagogical reasons, this exaggerated reliance upon the virtues of necessarily rigid geometrical schemes is nevertheless astonishing coming from a law professor with avowed inclinations for the humanities and so fond of his subject as to say in his preface that "a mastery of administrative law is . . . of aid in the development of the whole man"!

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ROBERT, J. *Les Violations de la Liberté Individuelle Commises par l'Administration.* Paris: Librairie Générale de Droit et de Jurisprudence, 1956. Pp. viii, 328.

This work inaugurates a series of publications to be issued under the title *Bibliothèque de Droit Public.* It makes a successful attempt to show important effects on French legal development of the critical conditions successively prevailing in France since the time immediately preceding the Second World War to the establishment of the Fourth Republic. By stressing the importance of the book in this respect, it is not meant, however, that this is the author's direct and exclusive purpose. He undertakes to envisage interrelations of individual freedom and governmental activities in a much broader frame.

First of all, the author develops and reviews the idea of human freedom in general and in its various aspects. He rightly emphasizes that unlimited freedom was impossible as soon as man became aware of the presence of others who also were anxious to preserve the sphere of their own activity unhampered. This awareness led to organized society in which governments were established in order to restrict individual activities for the good of everybody.

Both general human development and French history as reviewed in the book from the Middle Ages to the present, show how difficult it was to reconcile governmental power with the notion of individual freedom. The author rejects the idea of considering human beings only as tools of a collective will superim-

posed on the individual, and permits no doubt about his adherence to the concept of democracy as government of the people by the people. Nevertheless, he thinks that it is not sufficient that legally established opportunity be given everyone to participate in forming the general will which he is bound to obey. Freedom must be "organized" according to the author, lest either different branches of the government or extragovernmental (economic and social) forces make it illusory. "Organizing freedom" means for him in the last analysis: *security* for each individual that he will not be restricted in or deprived of the performance of his free activities, except in the strict compliance with legal provisions. In this respect, he emphasizes both the importance of the separation of governmental powers without making it too rigid, and that of the nonretroactivity of statutes, and also reviews parts of the French Code of Criminal Procedure. Provisions of the original Code and its later amendments, writes the author, sought to guarantee the fair investigation of criminal acts. The rights of defendants were sought to be protected by the outstanding role given to the *juge d'instruction* (examining magistrate) and elaborate dispositions were established in this respect. Exactly the latter, however, made the work of this magistrate so prolonged, cumbersome, and ineffective that he himself was willing to transfer acts of criminal investigation to the police in the largest possible degree. Quasi-official ("*officieuse*") police activities became widespread. They were tolerated because they were effective, though lacking guarantees of individual freedom and leading to many abuses against people arrested and detained.

This was a phenomenon evident long before the Second World War. The outbreak of the war, military events, German occupation, the Vichy era, and the time of liberation, however, gave opportunity to an immense scope of activities of executive organs to the prejudice of individual freedom, no longer protected by judicial procedure. Internment of citizens and expulsion of undesired foreigners were common events. Legal provisions relating to the matter were elastic and lacked precision in themselves. But what was worse, large-scale arrests, detentions and mistreatments, sometimes even deaths of jailed persons, occurred without being covered by any statutory disposition.

The consolidation of the Fourth Republic made an end both to the legal measures and undesirable practices mentioned above. But the authorities still had to deal with claims for indemnities of persons who had suffered grave prejudices. There existed also the possibility to incriminate those private persons and functionaries who were considered responsible for abuses and mistreatments. However, there was much less interest in this than in pecuniary reparations. It appeared to be more effective to demand this from the French state as responsible for its officials than from the latter who often lacked monetary means to pay indemnities.

According to specific provisions, it was in the regular courts where such suits should have been initiated. The claimants, however, preferred to bring the suits before the *Conseil d'État*, the French administrative court of great au-

thority. The main reason for this was that the procedure was less expensive and that the *Conseil d'État* was at a considerable distance from the place of events that caused the claims and was therefore less likely to have been under local influences than the scattered regular courts.

The high administrative tribunal found good reasons to accept the suits and made decisions in many instances based upon the question whether there existed faults and abuses that were sufficiently grave to engage responsibility of the state. Space does not permit us to consider this jurisprudence in more detail. Enough to say that extraordinary conditions had the effect of promoting a development in French law where practical aspects prevailed over strictly legal considerations.

The author refers to legal concepts of foreign countries and notably to the Anglo-American legal system at times though in essence his book envisages only the recent French legal development. Professor Marcel Waline of the Law Faculty at Paris wrote a foreword to the book underlining how far the world events of the recent decades were detrimental, at least temporarily, to the very idea of freedom. His conclusions pay tribute to the author exactly for familiarizing the reader with the new trends in the decisions of the French *Conseil d'État* as shown above. Every reader of the book certainly will gladly join him in his tribute.

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HELLBLING, E. C. *Österreichische Verfassungs-und Verwaltungsgeschichte. Ein Lehrbuch für Studierende.* Vienna: Springer-Verlag, 1956. Pp. xvi, 552.

This is the long-needed and worthy successor to Luschin's venerable compendium,[1] which covered the history of Austria's constitution and administration for generations of students until it grew more and more outmoded. Many things have happened to the Republic of Austria since the First World War, and we can be glad to have a book now that treats all of her public-legal history since her foundation at the dawn of Central European history until and beyond Hitler. The work is also a fine complement to the late Adamovich's two volumes on Austrian administrative law.[2]

Hellbling's work is divided into twelve "periods" of varying length, viz., from Roman days to the foundation of the Ostmark in 976; the origin of the various countries that were later to be annexed or, more usually, inherited,[3] such as Inner Austria (the core), Bohemia, Moravia, Silesia, Hungary, Trieste, etc.; the period when all these lands were united with the Austrian Archduchy

[1] Arnold Luschin von Ebengreuth, Grundriss der österreichischen Reichsgeschichte (2d ed. 1918).

[2] See Parker, book reviews, 3 Am. J. Comp. L. 287 (1954) and 5 Am. J. Comp. L. 146 (1956).

[3] The Hapsburgs' unofficial family motto since the 15th century was: *Bella gerant alii, tu felix Austria nube*!

making that country the leading European power, weakened only by the Turks, France, and the internal dissensions within the Holy Roman Empire, of which Austria and Bohemia (but not Hungary) were parts; the period from 1740 to 1792 characterized by the rulers Maria Theresa, Joseph II, the great reformer and at the same time blind German nationalist,[4] and Leopold II, who undid Joseph's reforms; the period of the absolutist police state or, as Austrians call it, the "pre-March"[5] (1792–1848); the revolution of 1848 and the ensuing reaction, which was far worse than the pre-March;[6] Austria as a constitutional monarchy (1867–1918), which was at many times somewhat a euphemism insofar as the emperor very often found it "necessary" to suspend the constitution, for instance, prior to the beginning of the First World War;[7] the two-year period of transition from the 1918 revolution to Kelsen's constitution of 1920, during which period Austria, stripped of all her former territories other than the old core lands of "Inner Austria," struggled to become a democracy; Austria's constitutional and administrative life under her federal constitution, including the major reforms of administrative law and procedure[8] and the creation of constitutions in the nine *Länder*, including Vienna, of which the republic is composed; "Austria Under Authoritarian Leadership," i.e., the Dollfuss-Schuschnigg period 1934–1938, a monstrosity to which merely four pages are devoted; the occupation by the German Reich;[9] and finally the present period of Austria restored, both before and after her peace treaties with the Allies. A bibliography of no less than 43 pages and genealogies of the various dynasties (Babenbergs, Hapsburgs, Luxemburgs, Árpáds, Anjous, etc.) that ever ruled parts of what later was to be Austria concludes the work.

The book, to be sure, is not a history of Austria. Rather, it presupposes some knowledge of what happened in those parts ever since Emperor Otto the Great in 970 decided to erect an Ostmark (i.e. "East Frontier") as a permanent bul-

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[4] He forbade religious convents not devoted to teaching or the tending of the sick; and he tried to enforce German as the official language in Hungary and even Belgium, which caused revolutions. But he also founded the Vienna National Theater (later *Burgtheater*), at a time when Frederick the Great refused to speak German except, of necessity, to common soliders.

[5] I.e., prior to the March, 1848, revolution in Vienna. The time and its style are also known as *Biedermeier*.

[6] Recent events in Hungary furnished unpleasant recollections of the sea of blood in which Austria and her ally, Russia, drowned the Hungarian revolution of 1848–49.

[7] Without absolutism, the war could not have been carried on, for the pro-war parties were in the minority in the Austrian diet.

[8] For which see Adamovich, Handbuch des österreichischen Verwaltungsrechts, 2 vols., 1953, 1954. Also, *supra*, note 2.

[9] The author impartially lists both the "Occupation Theory," under which Austria was merely occupied by Hitler, and the "Annexation Theory," which acknowledges that it was a part of Germany for seven years. The former theory is a pious fiction designed to ease the conscience of many Austrians as well as other Westerners who would like to forget that the *Anschluss*, alas, was at its time a legally recognized fact. See also Brandweiner, The International Status of Austria in Law and Politics in the World Community 221 (Lipsky ed. 1953).

wark against the hordes from the east.[10] Mere political events, such as the Thirty Years' War or Napoleon's dealings with Austria, are mentioned only in connection with effects on the law or the boundaries of the country. Hence, the book thoroughly discusses the provisions of the "Renewed Order of the Land" for Bohemia (1627) as a result of the Battle of the White Mountain, which ended Bohemia's national and religious independence[11] and replaced it by a cruel martial law reducing that country, once the most important member of the Holy Roman Empire, to a second-rate province, and in the upshot bore the germ of Czech 19th-century nationalism and of the dissolution of the monarchy; but these political consequences of the *Verneuerte Landesordnung* are barely intimated in Hellbling's book. The various charters and administrative reforms of the House of Babenberg (976–1246) are duly recorded and the alliances and treaties of fierce Leopold the Glorious (1198–1230) not omitted, but the deed by which the latter is best known both in Austria and the rest of the world, his imprisonment of England's Richard Coeur de Lion, is not narrated, obviously because it is not a part of the history of Austria's legal institutions. In other words, the book is not "colorful" but rather a piece of earnest scholarship: purporting not to be a general history, it lacks both historic criticism and a catalogue of cultural events. The mediocre clericalism of nearly all the Hapsburgs—Joseph II being the noteworthy exception—is not contrasted to their predecessors, the Babenbergers, who were quite a different breed and under whom Austria's greatest literary monuments[12] were accomplished. In short, as far as American readers are concerned, the book supplies the historian with needed data and legal surveys of important historical documents, but it does not teach him history; and it provides the lawyer with the public-legal history of one of the oldest legal civilizations of the Western world.

As a minor deficiency one notes the almost complete absence of a description of legal measures of Austrian rulers, especially the Hapsburgs, against the Jews of Inner Austria as well as of other parts of the monarchy.[13] The topic must be embarrassing to modern Austrian scholars, to be sure, but nevertheless it should not prevent him from reporting that, and why, Austria was known to medieval Jews as "The Land of Blood."

REGINALD PARKER*

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[10] The definitive investiture of the Babenbergs with the new *Mark* took place under Otto II in 976. This, then, is the birth year of Austria as a continuous entity, short of the Hitler interruption.

[11] Her political independence had ended in 1526 when the Hapsburgs inherited Bohemia.

[12] The *Nibelungenlied* (ca. 1205) and the works of Walther von der Vogelweide (ca. 1170–1230).

[13] The Luxemburgs, who ruled Bohemia until 1526, treated the Jews decently and Prague flourished with them.

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DE VISSCHER, C. *Theory and Reality in Public International Law.* Translated from the French by P. E. Corbett. Princeton University Press. 1957. Pp. xvi, 381.

The translation of this book of the Belgian jurist, a former Judge of the International Court of Justice (1946–1952), is welcome as it may stimulate thinking among English-speaking students of both international law and politics. In American legal and political thought, the soil is well prepared for this book, the first French edition of which has appeared in 1953, and a second, revised edition in 1955, both by the lingering memories of American legal realism and its lone struggle in the 1930's against insulated legalism, and also by the recent flare-up of dissension between what is called the realistic and the legalistic-moralistic approach to international politics.

The clue to the historical part, the broadest frame of reference in this book, is found in the appraisal of medieval doctrine. In the author's view, this doctrine, "by identifying authority with public service and subordinating monarchy itself to law . . . built the foundations for a regime of law which through the centuries would oppose to the absolutist and wholly political conception of sovereignty the eminently legal and functional notion of power ordered for human ends" (4).

If this is taken for the clue to what the author has to say of the development of international relations, the reader will be less surprised by his dual evaluation of balance of power, liberalism, popular sovereignty, democracy, public opinion, elites, and nationalism. He will understand better, perhaps, the apparent paradox in the author's presentation. On the one hand, he assures us that "the exclusively political view of international relations proceeds from the reason of State and leads to balance of power" (8), and that, "by the diplomatic technique based exclusively upon the calculation of forces and applied to their analysis with a lucidity and finesse previously unknown" (7), Italian modernity added only the last touch to the "lineaments of an evolution which came to completion in the Congress of Westphalia" (8). On the other hand, the golden age of international law in the author's view apparently coincides with the Congress of Vienna and the Concert of Europe, when the profile of the sovereign state was certainly more pronounced than at the Congress of Westphalia. Indeed he writes of the nineteenth century: "In its deepest meaning the international law of the period was the expression of a community of thought and moral attitudes, the Christian heritage of the peoples of European civilization" (136).

In addition to this historical sketch, the author also offers a general theory of the relations of power and law in international relations (71–129). Since "the search for the common good has nowhere so small a place as in international relations" (71), he singles out "a more or less random competition . . . between States" as the "fundamental political fact" (72). Speaking of 'the political,' the author states with resignation that "there is no possibility of locking up in a definition what is only the tendency to constant change" (73).

Though admitting that in periods of calm legal integration is possible, even though limited to what "governments have been brought by the exigencies of their mutual relation to regard as objects of collaboration" (74), he points out that agreements on armaments or conventions bearing on military or naval policy—and in general whatever is "intimately connected with the preservation or development of State power"—"is scarcely-cooled political matter which law only rarely succeeds in jelling" (74). In his search for the 'Criterion of the Political', the author arrives at a negative conclusion: "The notion of the political covers in international relations realities as yet uncontrolled not only by law but even by reason; its fluid and capricious character defies all attempts at classification" (77).

Indeed the author speaks of serious political tensions relating to territory, colonies, naval bases, war materials, and the like, where "reason vainly searches for a criterion, coming to a dead stop before the historical individuality of the State, which is nowhere more insistent on inviolability than in connection with the existing distribution of power" (80). And, speaking of the difference between balanced and hegemonial tensions, the author realistically points to "the factor which sooner or later destroys the balance, namely the inequalities in the internal development of peoples, some of whom advance while others fall back" (81). He realistically observes that "in such a climate the movement is usually irreversible" (82).

Having pushed realism and irrationalism so far as to deny the existence of international community, the author seems to have burnt the bridges toward reconstruction of international law. Nevertheless, he sets high hopes on international morality: "When all has been said about the rule of law and the obstacles that are placed in its way by the political drive of power, it is to morals that we must return" (93). This, in spite of the statement that "sacrificing on the altar of international community . . . 'the false dogma of sovereignty' " is useless, "because the immense majority of men are still infinitely less accessible to the doubtless real but certainly remote solidarities that it [the international community] evokes than to the immediate and tangible solidarities that impose themselves upon them in the framework of national life" (93). Even after having laid down that "men are prone to transfer their moral aspirations to the group to which they belong" (93), and that "to see in this nothing but calculation or hypocrisy would prove a singular ignorance of the psychology of peoples," since their morality "in their mutual relations is in large measure the product of their historical partitioning" (94), the author is confident that "by a return to man, by linking the conception of the State, organization and means, to the person who is its end . . . we can find . . . the sole moral and legal justification of the obligatory character of international law" (99). By now, he classifies the idea of international community with those "civilizing ideas" of which he professes: "The most intransigent realist cannot deny their reality or their strength" (99).

It is difficult to see how return to a morality, which is itself the product of

the historical partitioning of peoples, could strengthen international obligation and law, to which precisely the same historical distribution of power is said to be refractory. The vicious circle between reality as fact and reality as 'civilizing idea' could not be more glaringly exposed. Indeed, the author uses 'reality' as well as 'power' and 'the political,' each in two different senses. 'Reality' in his vocabulary means both freedom from illusion and—when this makes reality too ugly—the return to 'civilizing idea', hardly compatible with the former. Similarly, 'power' is both the reason of state which escapes law, and the "eminently legal and functional conception" which in the necessity of order finds "the point of coincidence where politics and justice may meet and complete each other" (139). Finally, the 'political' is both the unreasoned and the reasoned application of the power drive, the first refractory to law and the second its support.

This ambiguous terminology is responsible for confusion in the recurring expression "individualistic distribution of power among nations" (365), regarded as the primary cause of the deficiencies in international law. What is meant is so-called 'State-individualism,' the very opposite of a regard for the individual or, in the author's terms, for the human ends of power. Similarly, power is meant as State power, never as the collective power of several States or the international community. This leads to formulations such as: "Every international custom is the work of power. . . . There is no customary law that individuals take so little a part in forming as international custom" (149). Yet the author himself, arguing against the restatement of the laws of war, concludes that "the only laws that preserve their imprescriptible authority are the unwritten ones dictated by respect for the principles of humanity" (293). Indeed, customary international law is a typical example, not only "of the joint action of force and law" (150), as the author believes, but even more so of the prevalent power of common practice observed by governments, but which serves the needs of, and often is initiated by, human individuals as distinguished from 'State individualism.'

It is in the third and fourth books of the volume, dedicated to "convergences and tensions of law and power in positive international law" and "the judicial settlement of disputes," respectively, that the author presents the ripe fruit of his experience and wisdom. It is perhaps regrettable that these last two books, extending to two thirds of the volume, are preceded by the more theoretical and philosophical-historical speculation which is decidedly of more controversial nature. In the last two books, on the other hand, the reader will find a mine of information about the latest trends in international practice. The method is characterized by the author's caveat: "If abstraction carried to an extreme degenerates into irreality, individualization pushed to excess leads to the destruction of the rule" (138). Surely the author does not sin against the former part of this premonition. Another lead to his method is his thesis that "the application of the rules of international law, being more concrete in its phenomena and more directly accessible to observation, offers our method a

surer field of study than the development of those rules" (164). Indeed, the author always succeeds in making intelligible the social and political background of the operation of legal rules. He deals with a great variety of matters from this point of view illustrating his method, matters which include the creation and disappearance of states, nationality, migration, asylum, minorities, exchanges and transfers of populations, territory, river law, coastal waters, reserved domain, recognition, immunity, extraterritorial effect, treaties, diplomatic protection, responsibility, recourse to force, armed reprisals, war and neutrality, peaceful change, nonjusticiable disputes, resistances to compulsory jurisdiction, advisory function, and development of international law by way of judicial settlement of disputes.

The basic methodological view of the author finds best expression in the statement: "Every rule of positive international law . . . presents two essential aspects for critical examination on different planes: the degree in which its content corresponds to social needs, and the accuracy of its formal expression compared with the practice of States. The rule of international law retains its full force only insofar as it satisfies this double requirement. This is a fact of experience particularly well illustrated in treaty regulation. A normative (lawmaking) treaty the content of which is too far in advance of the development in international relations is stillborn, just as a treaty that ceases to be exactly observed in the practice of governments is no longer valid in its formal expression" (133).

These sound methodological principles are best seen in operation when the author applies them to the characterization of the processes of judicial reasoning in the practice of the International Court of Justice. Besides examples of generalization by classification, which abound in judicial decisions, he enumerates some examples of the inverse process of particularization: Austro-German Customs Union (1931), Interpretation of Treaties of Peace (1950), Reservations to the Convention on Genocide (1951), Fisheries Case (1951). Among the "innominate" forms of judicial reasoning, there are mentioned: deductions drawn from the notorious character of some situations; abstention or silence; historical consolidation; *quieta non movere*, and the like.

The author feels the need for some apology for the recent trend of individualization: "there is no reason for seeing here a threat to the existence or unity of customary international law; these retouches do not reach the foundations but only the constructional or technical features" (154). Though not everyone will agree with this, it is in demonstrating this process of individualization that the author is most convincing as to method. The Court deals with these individualized cases as with small universes or fields, discovering their field laws by elaborating their profile and ambiance in luxuriant detail. Working "in depth," availing itself of the "density and stability" of customary law, it finds the new, unexpected incidence of the old rule in confronting with it the rich variance of the case. It gets sight of the substance in the interstices of the process. This is undoubtedly the new trend observable in all the pioneering branches of jurisprudence.

But this is done in the wider context of the over-all field of international relations, the historical laws of which are depicted in this book as far from being propitious for legal integration. "Today the chance of codification of international law on a universal scale is nil" (147). "There will be no international community so long as the political ends of the State overshadow the human ends of power" (93). "There is no foundation for the international order if the internal order does not provide it" (124). "The transformations of power, in particular its evolution towards federal forms, obey laws whose complexity tempts analysis but up to the present prevents any general conclusion" (107).

If this is the realistic picture of the over-all field of international law and relations, the reader will better understand why the "individualizing tendency" apparent in the Court's decisions meets growing resistance on the part of governments. This is stated in the latest annual report of U.N. Secretary General, Dag Hammarskjold in alarming terms: "the present trend, if not soon halted, may render the whole system of compulsory jurisdiction virtually illusory" (New York Times, September 5, 1957, p. 10). Instead of merely deploring the 'ugly' reality of this latter trend, its deeper, underlying causes should be better understood. One of them may be that some governments wonder whether what looks as a net gain from the point of view of methodology does not lose its attractions by adding to, instead of detracting from, the "unbridled dynamism" of the over-all field of international law and relations. The methodologically new positions in the "individualizing tendency" of the Court are won at a cost of thwarted expectations of those who still rely on a measure of stability in international law. It is one thing to individualize and particularize law in a firm over-all framework of legality; it is another to do so in a sea of instability and incalculability. It is enough to mention that since April 18 Britain will not accept the Court's jurisdiction on any question which, *in the British Government's opinion*, affects Britain's national security (Manchester Guardian Weekly, August 29, 1957, p. 6). *Sapienti sat.* The author of this book, who sees so well the reliance of the international on the national order, has a sharp eye for the vagaries of sovereignty: it "asserts itself now in an unbridled dynamism that no legal order could satisfy, now in a shortsighted conservativism that in the end may prove equally dangerous to the stability of law" (309). In the present issue of reliance on the Court, however, few would speak of vagaries of sovereignty. Faced with an unprecedented hegemonial tension, the dimensions of which are hardly sufficiently taken account of in this book, governments cannot act otherwise if responsibility to their people and loyalty to their country still count as realities—both in terms of facts and civilizing ideas—on which both the internal and international order rely.

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CHOWDHURI, R. N. *International Mandates and Trusteeship Systems—A comparative study.* The Hague: Martinus Nijhoff, 1955. Pp. 328.

Although the International Trusteeship System represents no mere prolongation of the Mandates System—just as the United Nations organization is not simply a daughter organization of the League of Nations—the question arises, whether actually the Trusteeship System is more effective than the Mandates System, whether the machinery devised by the Charter for the supervision of the Trusteeship territories works satisfactorily, and whether Trygve Lie's assertion that the Trusteeship System has greater potentialities than the Mandates System will hold true.

In the present volume, prefaced by the Dutch teacher of international Law, A. J. P. Tammes, Dr. Chowdhuri points to the most important weakness of the new Trusteeship System which it has in common with the bygone Mandates System: lack of rigid regulations for administration to be observed by the administering authorities in their trust territories. To be true, the new system of the United Nations laid down broad principles for the guidance of the trustee powers, but it is up to the latter to implement them at their pleasure. However, a system of unbiased control has been introduced, as a distinct progress over the bygone League of Nations system: periodical visits to the trust territories are provided for, and visiting dignitaries can ascertain the facts on the spot and establish direct contact with the indigenous population.

The provision of the Charter (chap. XII, Art. 77, 1 c) that any member state may place its territories under trusteeship if it chooses to do so, appears somewhat idealistic. Actually, the Trusteeship System comprises as many territories as the Mandates system used to comprise—with the addition, this has to be admitted, of Somaliland.

The author shows that there exists a distinct rivalry between administering and nonadministering powers—or to talk more clearly, between colonial and noncolonial powers. The reader must not forget that through the General Assembly not only the United States but also the Soviet Union as a noncolonial power may try to implement United Nations principles as they understand them. On the other hand, the administering powers maintain that they alone have the moral and legal responsibilities of administering their respective trust territories. While the viewpoint of the administering powers apparently does not lack a kind of hypocrisy—yet, after the most recent occurrences in "sovereign" Hungary, we may look at the so-called colonial agencies with a more lenient eye than the author whose name is Asian; the administrative, i.e. colonial, authorities have reserved the right to decide for themselves, whether they wish to implement, modify, or reject the recommendations of the United Nations Assembly or the Trusteeship Council. The British argument may even sound worse (p. 301), that it was the first duty of the administrative authority to decide whether or not a resolution be incompatible with the proper administration of the trust territory or contrary to the "true interests of the populations." The guardian, as it were, claims a higher position than the Court of Chancery. However, the British argued, the administrative authority is bound

to respect the Charter and the Trusteeship Agreements as international treaties, and therefore as true international law. The General Assembly or the Trusteeship Council, on the other hand, are under no similar legal obligation. Dr. Chowdhuri quotes, but does not declare himself directly. Only with a certain regret, he assumes that the trustee powers regard their own interests to be diametrically opposed to those of the agencies mentioned.

We know today that the Soviet bloc in collusion with the Afro-Asiatic bloc would be inclined to justify the British argumentation, and certainly unwilling to place controversial territories, e.g. Kashmir, under trusteeship.

The Trusteeship as well as the Mandates System lack the power of coercion to enforce obligations. The author stresses, however, rightfully, that the United Nations is no super-state, no Union or Reich with subordinate member-states, but a voluntary association of fully sovereign nations united by the principle of international co-operation with no other means against trust powers in default but censure and "the mobilisation of shame."

Actually, the author reasons, non-self-governing territories disappear because of their voluntary association with the metropolitan countries, whereby the latter extend their full citizenship rights to the *sit venia verbo* colonials.

The book has been published in the Netherlands, is written by an Asian, and therefore probably the United States gets its full share of criticism—whether rightfully deserved or not, remains a question beyond the scope of this book report. The author addresses a few sharp words (p. 302) to the Union of South Africa which virtually incorporated the former mandated territory of South West Africa and has, up to now, successfully resisted any attempt at bringing that territory under trusteeship. The United States, however opposed to colonialism in the rest of the world, disregarded the Japanese demand for the restoration of the Ryukyus and Bonin islands; this seems to meet with the author's disapproval, which becomes accentuated to a higher degree when mentioning the experiments in nuclear fission in the strategic trust territories of the Pacific. Chowdhuri points out that such experiments are inconsistent with the basic objectives of the Trusteeship System (Art. 76 of the Charter) and with the lofty principles of the Trusteeship Agreement (Art. 6). The latter article expressly guarantees protection of health, land, and natural resources to the inhabitants of the islands. The author states in so many words (p. 305) that the United States by displacing the islanders from their ancestral homes and subjecting them to the radioactive fall-out actually returned to the worst type of colonialism hidden behind a hypocritical change of terminology.

Dr. Chowdhuri regards the liquidation of any trusteeship and proclamation of the selfgovernment and independence of any people under trusteeship as the latter's very aim and purpose. That the Charter does not contain regulations for the procedure to rule on the termination of any trusteeship is, in the author's opinion, the decisive weakness of the Charter.

The book should make fascinating reading for any American—be he an expert in international relations or not. He will learn that with all the outcries of certain politicians in the federal capital, in spite of all the trips of leading

cabinet members to Asia and Africa, the natives themselves view us as a white and basically colonial nation.

Dr. Chowdhuri's study, while dealing with the limited scope of the Trusteeship System, has the distinct advantage of being based on complete documentary sources as they were available at the time immediately preceding the final editing of the volume.

The book is divided into ten chapters, the first of which familiarizes the reader with the history of the two systems, while the last, inscribed *Conclusion*, contains the author's rather pessimistic outlook. The titles of the other chapters—your reviewer will not enumerate and quote the 34 sub-chapters—indicate the rich, almost exhaustive content of this important work: Evolution of the International Trusteeship System; Drafting of the Mandates and Trusteeship Articles; Establishment of the Two Systems; The Territorial Application of the Two Systems; The Agencies of International Supervision; The Permanent Mandates Commission and the Trusteeship Council; Operation of the International Trusteeship System I; same II.

A carefully selected bibliography and a very complete alphabetical index—not frequently found in European books—assist the reader.

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VAN WYNEN–THOMAS, A.—THOMAS, A. J., JR. *Non-Intervention. The Law and Its Import in the Americas*. Foreword by Julio Cueto-Rua. Dallas: Southern Methodist University Press, 1956. Pp. xvi, 476.

The title of this very interesting book is a vast understatement. The many forms in which states have tried to intervene in the affairs of other states make it necessary that any thorough investigation of the rights and wrongs in such cases will practically amount to a full-fledged examination not only of the rights and duties of states but also of the machinery of the United Nations and of regional organizations. This the authors have done in exemplary fashion. They give not only a wealth of factual information in a very condensed form; they illustrate moreover—although in summary fashion—the historical-political background of the various interventionist measures discussed and even venture to elaborate the basic philosophic principles on which the rules concerning the rights and duties of states are based. This latter investigation is rendered necessary by what the authors call their "axiological" approach. They believe that certain fundamental philosophical principles of our Western heritage should be at the basis of international law. They deplore that this aim has not always been realized in the past and warn against any watering-down of these principles either in the name of positivism or of realism. They strongly condemn any tendency to abandon these principles for political expediency, especially any appeasement to communist or fascist tendencies. According to them it never pays in the long run to condone injustice in order to buy peace. There can be no quarrel with this statement from a strictly philosophical angle. It is also supported by historical experience—and yet this re-

viewer has the gravest misgivings against the practical implications of such an attitude. In view of the horrors which a third World War would bring on guilty and innocent alike, is it really defensible even from a moral point of view for a state to stand by its rights—be they anchored in the most solid moral principles—even at the risk of declenching such a war?

As for the proper subject matter of the book, it begins with a historical survey of intervention from the 19th century onwards especially in the Americas, throwing interesting sidelights on the origin and the varying interpretations of the Monroe Doctrine. The discussion of collective forms of intervention leads to an interesting analysis of the respective rights and duties of UNO and regional organizations (especially OAS) and to a rather sceptical evaluation of the role of UNO in the modern world. The authors rightly support the theory advanced by Verdross that in case the law of the UNO proves incapable of resolving a problem—a situation which will easily arise especially due to the veto clause—the rules of general international law come into their own again. This is due to the fact that the UN Charter was only grafted on these rules and was therefore unable to abrogate them. The authors then proceed to discuss the various forms and reasons given by individual states for their interventions. The authors always start by stating the rules of general international law, the rules of UNO, and lastly the usually highly elaborate rules of OAS. All these rules are illustrated by ample references to actual cases—the history especially of the relations between the United States and the South American States being unfortunately very rich in pertinent examples. The authors defend the United States attitude in its struggles with the communist bloc and even appear to ask for more and more energetic interventions in this respect. They do however not hesitate to declare that in the past United States policy in the Americas did sometimes not conform to the rules of international law. As for the nonintervention rules worked out by OAS, they are certainly very interesting, but it would appear impossible to adopt them as rules for universal application as these rules presuppose a certain common background and common spiritual and moral values. All of these pre-requisites, however, are lacking in the present day international community, if we resign ourselves to the fact that communist states also are members of this community (this, incidentally, the authors refuse to do).

This reviewer was especially interested in the chapter on intervention in order to protect property, where the authors go to the roots of the philosophical concepts of property in order to explain the various attitudes of states in respect to confiscation. According to them, the former owners of property confiscated in violation of international law should be able to claim such property if it is subsequently found outside the confiscating country. In spite of some recent decisions to this effect, this seems far from being general practice. The authors deal also at length with intervention in time of civil strife. It seems strange that Hackworth as well as the present book fail to mention any precedents for the problem which Austrian courts and authorities had to face last year, to wit, how long should soldiers belonging to one of the

factions in a civil war be interned in a neutral country after having crossed the latter's border (*cf.* this reviewer's article: Du Droit d'interner des étrangers selon la jurisprudence autrichienne, Annuaire Francais de Droit International 1956, p. 516–519). Among the other topics discussed, I should like to mention only intervention by propaganda, intervention for democracy, the right of asylum, economic boycotts, and a pertinent defense against communist allegations that Marshall Aid amounted to illegal intervention.

To sum up—this is a remarkable book on a very topical and controversial subject. While I would hesitate to adhere unreservedly to some practical implications which, I at least assume, the authors advocate in virtue of their axiological approach, there is little occasion to criticize details of their work. Two things only struck me as doubtful. Did the United Nations General Assembly's condemnation of Franco Spain really survive Spain's entry into the United Nations? (p. 147) The views advanced in respect to Germany's present situation under international law also seem to be rather unconventional (p. 198). Moreover, the late Jan Masaryk was Foreign Minister and not President of Czechoslovakia (p. 318). But these few critical remarks should not detract from the merits of this outstanding work.

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DECKER, G. *Das Selbstbestimmungsrecht der Nationen.* Göttingen: Otto Schwartz & Co., 1955. Pp. x, 435.

The present volume addresses itself to a subject that was of great importance in international debates during and after the First World War and which has been fanned to new flame in present-day Germany: the nations' "right" to self-determination. The book is divided into fifteen chapters, which deal with the past and present approaches to the problems. The attitude of the charters of the League of Nations and the United Nations, as well as of their members is demonstrated and, on the whole, well supported by quoted statements and authorities. I could observe only one major omission in a rather important connection. The author praises the American attitude as benevolent toward self-determination; yet he neglects to note one of the very instances when we actually were ourselves concerned with this "right" and promptly failed to acknowledge it. When we pressed Denmark to cede to us the Danish Antilles, now known as the Virgin Islands, the Danish government suggested that the will of the inhabitants be inquired into by plebiscite, which we flatly rejected![1]

A minor flaw, which, however, casts doubt on the author's professed objectivity, is his remark that after the war Alsace-Lorraine "was separated from the German Reich's and people's soil" in violation of the self-determination principle. Why, even Hitler admitted, before the war at least, that the two former Imperial Provinces did not necessarily belong to the Reich,[2] a recognition to

[1] The correspondence between the Danish minister and Secretary of State Lansing is set forth in Svarlien, An Introduction to the Law of Nations (1955) 179.

which the author would have been easily led, had he stopped to inspect the various election results of the old imperial *Reichstag*, in which the Alsace-Lorrainians voted exclusively for the irredentist, anti-German party. It is in line with the author's sentiments that he believes in the "right" of peoples separated by "force" from Germany to reunite with her, "even against the resistance of separatists."

This, then, brings us the basic, cardinal vice with which this book is inherently afflicted. The author fails to inform his readers on what law or laws his right to self-determination is based; and, assuming that there is such a right, who the groups are to exercise it.

If self-determination of nations—supposing *arguendo* that the institution is capable of being a legal right—is a true right it must be based on law, on a norm of international law. Nowhere is the author able to point to more than vague statements and proclamations that do not raise the principle beyond the status of a mere postulate. The author, admitting their vagueness on this point, in vain quotes Articles 1, 55, 73, and 76 of the United Nations Charter. He rejects as "untenable" the opinion[3] that the Charter is, indeed, based on the member nations' sovereignty, which means that the self-determination of nations—or peoples, as the Charter says—means no more than what it says: self-determination of the states, rather than of national groups within the states; he rejects the further opinion that, insofar as the Charter alludes (it does hardly more than that) to the self-determination principle, it makes nothing but an attempt to proclaim the desirability of the principle of democracy as a form of government whereby the people, hence also national or cultural groups, to a large extent share in the lawmaking process. The authors of the Charter, or at any rate the three main Western authors, wanted that, and not more than that, to an extent varying with the degree to which their appetite for colonialism was not yet stifled. They wanted, short of exceptions and mental reservations, the world to be democratically governed; but to accomplish a Charter of all the United Nations rather than a mere *convention démocratique* they had to forego transforming this principle into a binding norm. Perhaps it might have been better if only the democracies had formed a supranational organization and embodied democracy as a "must" in its charter; but that would hardly have been universal international law.

But even assuming the existence of the right of self-determination as a "right," in what, then, does it consist and who is to exercise it?

As to the second of these two questions, the author seems to take it for granted that only national (or "racial") minorities are entitled to self-determination. Why? Why could not the Bavarians claim it as against Germany? Why not the Protestant Frankonians (Nuremberg) who speak a different German dialect, against the Bavarians, whom they dislike? Moreover, what makes a group a "nation"? The idea that there are different races is now a bit ob-

[2] See, e.g., Hitler's speeches in My New Order (de Roussy de Sales ed. 1941) 321, 521, 633–34, 744.

[3] E.g., Kelsen, The Law of the United Nations (1950) 51–53.

solete[4]—let us hope, in Germany too. Are the Slovaks, who speak the same language as the Czechs, a different "nation" than the latter and hence to be granted self-determination? If they are not and if the Croats are not a nation different from the Serbs (the author does not reveal his opinion in either instance) then where lies the logical or historical justification for drawing the line on the basis of, say, a different language? Culturally and as to religion the Serbs, whose heritage is Byzantine and Greek Orthodox and who lived under Turkish domination for many centuries, have little in common with the Croats, who are Catholics, have a Central European background and outlook and who were partly never and partly but long ago dominated by the Turk. From the point of view of common religion and common history, the so-called Sudeten Germans are certainly to a great extent a part of the Czech civilization.

As in recent decades it was very often cultural rather than national groups, such as the Slovaks in Czechoslovakia and the Croats in Yugoslavia, that clamored most loudly for autonomy, the author ought to have focussed his problem accordingly. But even if he had done so, he would not have solved the insoluble: just what does the right, or more accurately speaking the postulate, of self-determination grant? If it were to be mere cultural autonomy, such as the right to have schools and law courts in one's own language, we democratically minded readers would have no objection, even though this would leave much detail to be settled. But the author regards such undertakings, even if based on treaties such as the Austro-Italian treaty of September 5, 1946, concerning the former South Tyrol, as a "substitute solution." Full independence or *Anschluss* with the neighbor is his answer. And, sure enough, the author's concluding chapters are devoted to the Germans' right to self-determination. However, inasmuch as there are nowadays hardly any Germans living outside Germany (except for Switzerland and Austria, whose German inhabitants, the author reluctantly admits, want no union with Germany), the author's demand must be expanded so as to include the "right" of the German expellees to return to the territories from which they were driven. This would amount to a restoration of Germany as she was in 1937 plus Danzig and the Sudetenland!

Even the most superficial perusal of any book describing what the Germans, hundreds of thousands of them, did in the countries they occupied[5] should convince anybody that no Czech or Pole will seek either to live again with Germans or to give up territory taken from them.

REGINALD PARKER*

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[4] *Cf.* What Is Race? Evidence From Scientists (Unesco 1952); Boyd, Genetics and the Races of Man (1950); Dunn and Dobzhansky, Heredity, Race and Society (rev. ed., Mentor, 1952).

[5] The best of the shorter books is Poliakov and Wulf, Die Juden und das Dritte Reich (1955), containing ghastly documents in facsimile. See also Lord Russell of Liverpool, The Scourge of the Swastika: A Short History of Nazi War Crimes (1954); and the partly rather shallow Harris, Tyranny on Trial: The Evidence at Nuremberg (1954).

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KELSEN, H. *What Is Justice? Justice, Law, and Politics in the Mirror of Science. Collected Essays*. Berkeley and Los Angeles: University of California Press, 1957. Pp. 397.

Of the fifteen essays collected in this volume twelve have been previously published. But even these are presented in a revised version, so that the entire train of ideas running through the volume may be taken for a unified whole. The leading essay in a sense sums up the lesson of the entire volume. This is that justice is relative, absolute justice being beyond reason, while legal science is true science but restricted to a description of positive law. Some readers will disagree, no doubt, with the first part of this thesis, others with the second, but none will be able to deny that the most challenging problems of legal method and epistemology are treated here with a brilliance—in the more popular leading lecture even with a virtuosity—unsurpassed today.

The reason why Kelsen finds most definitions of justice empty and tautological is that he starts with a thoroughly irrational and subjectivistic preliminary definition: "the longing for justice is men's eternal longing for happiness" (2). Assuming next that—at some time—"the happiness of the one is inevitably the unhappiness of the other" (2), it is not very hard to conclude that any conflict of interests amounts to a conflict of values which cannot be solved by means of rational cognition. Few will argue that absolutely irrational conflicts can be solved by reason alone; few will admit that the longing for justice is so irrational. The argument: "where there is no conflict of interests, there is no need for justice" (4) is as valid as to say that where there is plenty of air, there is no need for air in human lungs.

The argument begins in earnest when the futility of defining justice is explained by its origin in emotional and subjective value judgments. But it turns out later that these are not absolutely, but merely relatively, different from statements about reality, as regards their subjective character. If "the perceptions of our senses are in much higher degree under the control of our reason than are our feelings" (296), this position already implies the possibility that, after all, there may be differences in degree between statements about what is just as well. It adds some weight to this view that revolutions in natural science —a science taken for granted in much higher degree than social sciences—have uprooted more 'self-evident' beliefs than did social revolutions. Absolute justice is not refuted by the fact that it is known imperfectly: it is axiomatic in science that only a small part of nature is known by man with any exactitude.

Indeed, the first question to ask would be whether relativism is in a position at all to prove an absolute difference between what is relative and what is absolute? If everything is relative, the difference between relative and absolute must be relative as well. It would help too, perhaps, also to adopt a more sober use of the term 'absolute.' 'Absolute' does not necessarily mean 'absolved from *all* conditions': it may well mean only 'absolved from *some* conditions.' Since Kelsen himself admits that under some conditions one solution, under others another, ***may be just*** (22), he hardly can object to calling a solution fitting the

conditions simply just in every sense of the word, except in the absurd one of being free from *all* conditions. The very existence of the globe and the sun permitting life, as well as the existence of a historically developed community, are conditions of justice, insofar as humans are concerned.

The treatment of justice by Kelsen is interesting in the sense that he deals with it as a question to which "man cannot find a definitive answer, but can only try to improve on the question" (1). And it is a hallmark of virtuosity that his treatment makes transparent, as it were, not only his own manifest views—which he apparently overstresses—but also the futility of the already somewhat tired debate between ill-defined absolutism and relativism.

Much more interesting and conclusive is Kelsen's methodological argument directed to the proof that legal science is truly scientific. Briefly, it is based on the recognition that, somewhere between judgments about reality and subjective value judgments, there are objective value judgments, which, however, are but a specific type of statements about reality. Such are teleological judgments—asserting that a means is appropriate for achieving an end—to which judgments of law (or juristic value judgments) are assimilated.

As might be expected, however, serious difficulties are involved in the simultaneous affirmation of the scientific character of jurisprudence and denial of such character to any inquiry into justice. Thus, on the one hand, teleological judgments are recognized as objective, while on the other hand, it is admitted that "if the ultimate end is not justifiable, the means to this end is also not justifiable" (10). This is a good example of a concession veiled by eventual revocation: the subjective character of justice must impair the objective (teleological) value judgment, while the latter must relieve justice of the whole burden of subjectivity and endows it with a relative, objective, though conditional character.

Another serious difficulty arises from the position which bases the objective character of legal value judgments on the meaning of norm-creating acts—which may be verified as any other fact—and on the effectiveness of the legal order as a whole—similarly verifiable. In other words, the scientific character of legal science is maintained because its statements, like teleological judgments, in ultimate analysis are judgments about facts. Yet it is also maintained that "facts are considered in jurisprudence only to the extent that they form the content of legal norms" (267), and that "there are no absolute, directly evident facts in the province of law, no 'facts in themselves,' but only facts established by the competent authority in a process prescribed by the legal order" (252). In this way, legal science is restricted to the content of norms, already ascertained, and unable to get at the facts which it would have to verify in order to ascertain its own scientific character. Still, it is claimed that, since the values of law "lie in the relations of a behavior to a legal norm," as a consequence "a behavior is lawful or unlawful 'for everybody,' just as a thing is heavier or lighter than air "for everybody" (226).

The type of legal science Kelsen proposes—restricted as it is to the content of

legal norms—cannot well get at the facts on which its scientific character is said to depend. Nor can it get well at its specific hypothesis on which its legal character is said to depend, for "to ascertain the validity of the nonpositive norm of a positive legal order is beyond the sphere of a science whose object is this positive legal order" (361).

But the most amazing thing in the entire argument of Kelsen is that, after having devoted a good part of this volume to the demonstration that justice cannot be the object of science because it depends on emotional value judgments, he eventually admits of a science of politics dealing with "political values," one of which is justice: "the specific value according to which the positive law as legal reality may be evaluated" (365). This, we are assured, is "not so paradoxical as it seems" (356). All that is needed is to distinguish between describing and endorsing political value judgments and, foremost among them, values of justice. The amazing final result is, then, that a science of politics, including justice, is possible under the same conditions as a science of law is possible. And this result is, indeed, not so amazing if "a system of morals and its central idea of justice is a social phenomenon, the product of society" (7), and if "the idea of justice always more or less reflects the social reality as it appears in positive law" (42), and if "no social order, not even the one we call 'morality' or 'justice,' is considered valid if it is not to a certain extent effective" (290).

The deepest source of Kelsen's whole effort to purify legal science, and to denounce natural law and doctrines of absolute justice, is his fight against ideologies that veil reality. No motive can be more respectable. But science must prove its mettle not only negatively, in eliminating prejudice, but also positively, in ascertaining its own hypotheses and thus yielding advance in relevant knowledge. However, purism in general, and pure theory of law in particular, are more successful in eliminating what is unscientific than in establishing a working method conducive to increase in knowledge. The purist is more anxious to get rid of prejudices than to shoulder responsibility for advance in positive scientific achievement.

This prompts Kelsen to deprive legal science of close contact with facts on which the very scientific character of jurisprudence is made to depend. Being concerned with the content of legal norms, the legal scientist is barred from any knowledge which mirrors the positive and effective nature of these very norms. But legal science is barred also from any possibility of deriving the validity and legal character of these norms: it is forbidden to "presuppose" them, even though they must be "postulated" by "juristic thinking." Legal science is thus barred from observing the continuous transition of legal validity into moral, political, conventional, or custom-like validity. Though all these may be construed as normative systems as positive, valid, and effective as positive law itself is, yet their "basic norms"—their initial hypotheses—being different, legal science has nothing to do with them. The legal scientist may state that something is or is not in conformity with a legal norm, but even this is legally ir-

relevant because the legal authority may decide otherwise and then legal science must listen to him: libraries of legal science may be rendered irrelevant by a stroke of the pen. What remains then of a legal science productive of knowledge? An interpretation of legal norms that enumerates all the logically possible meanings of a document, but leaves the choice between varying interpretations of a perhaps intendedly ambiguous text to the legal authority.

Legal science here appears in chains forged by purism, anxious to keep it free from anything nonlegal, until the legal itself is superseded by pure logical form. But this inability to get either at facts or at norms may be explained, perhaps, by the significant endeavor to distinguish between external and internal judgments: those *about* law and those *of the law*. Along this line of demarcation, general theory of law (dealing with the first) and legal science (dealing with the second) used to be distinguished.

However, this way of escape is barred for pure theory of law as normative jurisprudence. For even though it recognizes that sociology of law as well as theory of justice are, in principle, sciences of law which complement normative jurisprudence, the author thinks the latter may keep aloof. The purist dissociates himself from disciplines the inferiority of which in scientific exactitude—as compared with his normative method—he takes for granted. But hereby he bars his own theory of law—and not only his legal science—from getting at facts as well as from getting at norms. It may be claimed, of course, that much sociology is involved in the structural analysis of law, in the description of its functioning, especially the dynamic process of its creation, as the sketch in this volume of the evolution of legal technique may exemplify.

The co-operation between normative jurisprudence and sociology of law does not become clearer when inquiry into the effectiveness of law is reserved for the latter, and its validity for the former. For at the same time, it is claimed also that the value judgments of the law, and the judgments of legal science even more so, are in the last analysis judgments about reality. This would classify pure theory of law as well as legal science as sociology—lock, stock, and barrel.

The access to valid norms, however, is barred for both theory and science of law by the amazing postulate that, though the basic norm "must be postulated" as a presupposition of "juristic thinking," yet the legal scientist must not presuppose it as valid. Obviously, once more here the purist is on work. Not he, but others, presumably the practitioners, are bound to presuppose the basic norm as valid. He washes his hands. What others "have to postulate" and to "presuppose as valid" becomes a mere initial hypothesis in legal science. In other words, he is so pure that he dissociates himself from the two postulates declared by him necessary for all juristic thinking. He cannot be made answerable for the basic principles on which the whole edifice of his own normative jurisprudence has been erected: effectiveness of the law (handed over to sociology of law) and its validity (handed over to not-so-pure jurists). But washing hands cannot be substituted for surgical operation, nor whetting methodological knives for the entire task of science.

Thus, even granted that jurisprudence in this sense is an unprejudiced and scrupulously logical interpretation of an ideology—and granted also that the purist dread of any justification of positive law serves this highly respectable purpose—the question still remains whether pure theory of law made indeed the first steps in securing some knowledge about law which is here to stay because verifiable by reason and experience? The answer is that, even though the fundamental relations introduced by pure theory of law—imputation as the static relation between delict and sanction, and delegation as the dynamic relation between norms at various stages of the legal pyramid—look fine as a kind of geometrical dimension—and their importance as regulative ideas ordering our thinking about law cannot be assessed highly enough—they hardly increase our knowledge in the same sense as, say, the Pythagorean theorem does.

This is perhaps because stripping jurisprudence of everything but the content of norms—excluding both facts and ethical-political postulates—revenges itself in its own method by rendering it a rather emptygoing mill. Restricted to the content of legal norms as it is, legal science still cannot deal with them in any substantive sense—this would involve consideration of either fact or value judgments, or both, dreaded by the purist—but merely in the formal sense of spinning lines of imputation and delegation. But even these lines are not allowed to be drawn so as to become *indefinitely* long—like the lines of causation—but must have definite end-points. This in itself looks very suspicious from a scientific point of view.

A discipline restricted to the content of legal norms which still clings to the dogma that *everything* may be the content of such norms can hardly deliver the answers expected from a science of law. Kelsen's imperishable merit is that his critical analysis makes room for science, but his own legal science is hardly that science for which he makes room. To be sure, he has some answers which a legal science is expected to give: how law changes or endures, inexorably or under human manipulation, and what ends—indefinitely progressive ends—are furthered by its respect, change, or abolition? But then he speaks as a sociologist, or as a philosopher of justice who in despair abandons the task to a free-for-all conflict of interests. He certainly blazed a trail and the coming pioneers of legal science worthy of the name will remember him when they reap the full harvest of methodological endeavors in the field of law.

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Book Notices

KLEIN, F. E. *Considérations sur l'arbitrage en droit international privé précédées d'une étude de législation, de doctrine et de jurisprudence comparées en la matière.* Vol. 11, International Law and International Relations, Bâle University School of Law. Bâle: Editions Helbing & Lichtenhahn, 1955. Pp. 320.

The present volume merits the attention of all lawyers concerned with international commercial arbitration as well as of those interested in comparative law. It gives first of all a complete survey of legislation and leading cases on commercial arbitration in all West European States as well as in the United States and Canada (plus a summary of South American practice). Moreover, the theories developed by leading authors of these various countries in respect to arbitration are amply discussed in this first part. The author then proceeds to expound his views on conflicts of law in cases of international commercial arbitration. This part shows at the same time the similarities and discrepancies of the various national arbitration systems. At the end of the volume, the author has summarized his views regarding the best solutions of conflicts of laws in matters of international commercial arbitration in a set of proposed rules. In view of the ever-growing importance of international commercial arbitration, it is hardly necessary to stress how welcome such a searching and thorough contribution as Dozent Klein's work will be to everyone concerned with this subject.

IGNAZ SEIDL-HOHENVELDERN

Maritime Laws of Switzerland (*Seeschiffahrt*). Berne: Swiss Federal Chancellery, 1956. Pp. 352.

The comprehensive Swiss Maritime Statute of September 23, 1953, has now been completed by appropriate Regulations and by ratification of many International Maritime Conventions. The whole has been conveniently published in a handy volume.

The events of World War II—1939–1945—demonstrated that neutral Switzerland could not rely on chartered vessels of other flags for maintenance of essential imports and corresponding exports. A Swiss merchant marine was therefore hastily created, and temporary laws declared to govern its activities. A thorough-going modern Shipping Act of 73 Articles was enacted on Septemer 23, 1953. It has been completed by Collision Regulations (the same as the London Solas text of 1948); Crew Quarters rules (based on ILO Convention No. 92); Crew Sickness and Accident Insurance provisions; Service Rules for Swiss crews (dated November 15, 1956); control and audit rules for Swiss shipowners (dated November 20, 1956); Log Book Instructions to Masters and Consuls as to Police and Civil Records (dated October 8, 1956); Health certificates for Seamen; Schedule of Fees (dated November 20, 1956); Rules of the Swiss Sea Shipping Commission (dated November 20, 1956).

Switzerland has also ratified the following International Conventions:

Liens and Mortgages, Brussels, 1926; Ocean Bills of Lading, (COGSA), Brussels, 1924; Collision Liability, Brussels, 1910; Assistance and Salvage, Brussels, 1910; Sovereign Immunity respecting Merchant Ships, Brussels, 1926; Penal Jurisdiction in Collision Matters, Brussels, 1952; Civil Jurisdiction in Collision Matters, Brussels, 1952; Arrest of Ships, Brussels, 1952; Safety of Life at Sea (SOLAS), London, 1948; Freeboard of Merchant Vessels (Load Lines), London, 1930.

It may be noted that Switzerland has not adopted the 1924 Limitation of Liability Convention; and the

Madrid 1955 text is only approaching diplomatic consideration. In the interval, Switzerland has adopted a text on the British model, with a forfeitary value of 500 Swiss francs per gross register ton.

The new Swiss laws are an excellent model for the guidance of new states and nations and for the reform of laws of older states.

ARNOLD W. KNAUTH

WILBERFORCE, R. O.—CAMPBELL, A.—ELLES, N. P. M., Consulting Editor: R. GRESHAM-COOKE. *The Law of Restrictive Trade Practices and Monopolies*. London: Sweet and Maxwell, Ltd., 1957. Pp. 677.

Through the Restrictive Trade Practices Act of August 2, 1956,[1] Great Britain has received a rather complete and effective law of trade restraints. This act has widened the possibilities of governmental and judicial control of restrictive trade practices far beyond the limited scope of the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948.[2] The joint authors present an extensive commentary on these British laws against monopolies and restrictive trade practices.[3] They begin with the legislative history of the Act of 1956, with a general historical review of the monopoly and restraint of trade concepts in England, and with a detailed discussion of the common law concerning the subject. The main part of the volume is devoted to the Act of 1956 that has brought radical alterations in the legal treatment of restrictive trade practices, and of resale price maintenance. In general, restrictive trade practices are now deemed to be contrary to the public interest (sec. 21 of the Act). Exceptions are made for restrictions that protect the public against injuries, that are necessary to counteract competing monopoly, or for export trade, etc. Restrictive trade practices being contrary to the public interest, however, are not as such forbidden. They have to be registered, brought to the attention of the Restrictive Practices Court by the Registrar, and are to be outlawed by court decree. It is of great practical value that the authors give much room to the discussion of the registration and court procedure, and attempt to give proposals for the judicial investigation of registered agreements under the criterion of "public interest." It is interesting that in dealing with the economic and social policy involved in the test of "public interest," the authors do not seek help in the economic literature but rather leave to the court a broad range of discretion. The new law of resale price maintenance that prohibits collective enforcement but justifies individual resale price systems, and the functions of the reconstituted Monopolies Commission are discussed somewhat summarily as compared with the other parts of the book. The appendices contain the statutes governing the British law of trade restraints, and for the comparative reader the laws of other countries in detail.

WOLFGANG FIKENTSCHER

KOONTZ, H.—GABLE, R. W. *Public Control of Economic Enterprise*. New York, Toronto, London: McGraw-Hill Book Co., Inc., 1956. Pp. 851.

A lawyer educated in terms of "maintaining competition" may sometimes forget that the field of trade restraints and monopoly is just a part of the social control of economic enterprise. This book usefully gives an over-all picture, not a system, of the various branches of public control of private business. In the wide ranges of labor, public utilities, transporta-

[1] 4 & 5 Eliz. 2 c. 68.

[2] As amended by the Monopolies and Restrictive Practices Commission Act, of 1953 (1 & 2 Eliz. 2 c. 51).

[3] See also, *e.g.*, Hailsham-McEwen, The Law Relating to Monopolies, Restrictive Trade Practices and Resale Price Maintenance, London 1956.

tion, protection of investment, as well as by the example of a war economy, the authors show how divergent social aims must be brought into one line to guarantee maximum efficiency of a socially adjusted economy. The concept of fostering and maintaining competition as the general source of economic vigor and development is just one look at the public control of economic enterprise. So this book may serve the jurist as a useful compilation of material regarding the complexities of means and ways through which the public tries to gain control of free economic enterprise. The authors observe that one of the interesting results of government control of business is that programs of control have a tendency to expand. This is certainly true for every modern national economy, and the authors do right in warning that this development continues indefinitely. The question puts itself how the essentials of free economy may be protected in this context of freedom and control. The authors give the answer by examining the constitutional basis for every branch of government control that is treated in the book. Also in this regard, the volume is useful for the lawyer to read.

WOLFGANG FIKENTSCHER

WILLISTON, S. *A Selection of Cases on the Law of Contracts*. Sixth Edition by William T. Laube. Boston, Toronto: Little, Brown and Company, 1954. Pp. 1233.

The sixth edition of any book is a recommendation in itself; it is even more so if the book is a casebook. If, however, several decades have gone by since the book was first published, the author or editor will be confronted with the thorny question whether to leave it unchanged or to give it a new look. Whatever course is chosen, the decision taken and its consequences deserve just as much attention on the part of the reviewer as did the original edition. In this case, the book was first edited in 1903, and Mr. Laube, to whom we owe this edition, frankly admits in his prefatory statements that he was determined to bring the book up to date. He certainly did, and as a result, this venerable old casebook presents itself in surprisingly modern shape. When it arrived on the reviewer's desk he decided that, having received his legal training under a Continental system, he could not pass judgment on such a book immediately. Thus he has been using it for more than two years in order to discover and assess its merits and demerits on the basis of practical work in the field of comparative law. As a result, however critical he still is of some aspects of the case method as a whole, he feels that the book makes commendable efforts to give the student more than bewildering cascades of judicial verbiage. The cases—both the facts and what the editor considers obiter dicta—have been condensed; further developments of the legal rule laid down in the leading case are briefly sketched; Williston on Contracts and similar works are frequently referred to in footnotes; so are the provisions of the Restatement, wherever applicable, and the pertinent articles published in legal periodicals. Each chapter is preceded by an introduction. Many cases decided in the horse and buggy age have been replaced by very recent ones; this makes the book compare favorably with others which convey the impression of legal archaeology. Chapters on Specific Performance and Restitution have been added at the expense of those dealing with the Statute of Frauds and Legality, thus completing a picture of Anglo-American contract law which would otherwise lack its finishing touch. It should also be mentioned that the table of contents and the index are much more helpful than is usual in casebooks. On the other hand, while the reviewer found that most fields are adequately covered, he feels that more emphasis might have been given to the increas-

ingly important question of contractual limitation of liability, starting from *Paradine v. Jane*. As far as impossibility caused by foreign law is concerned, some mention should at least be made of the problems connected with foreign exchange control provisions. Finally, the *Fibrosa* case became the victim of one of the very few misspellings; it should read "Akcyjna," not Axyan. Irrespective of such minor objections, however, the reviewer is glad to state, as an over-all impression, that this is a very useful re-edition of a very useful book.

EUGEN DIETRICH GRAUE

ZOLLIKOFER, P. L. *Les relations prévues entre les Institutions Spécialisées des Nations Unies et la Cour Internationale de Justice*. Leyde: A. W. Sijthoff's Uitgeversmij, N. V., 1955. Pp. 94.

This brief study could almost be called revolutionary for its conservative attitude in respect to the proposed reforms of the Statute of the International Court of Justice. While dominant opinion everywhere seems to agree on the necessity of giving full access to the Court—on the same basis as States—not only to Specialized Agencies of the United Nations but to all international organizations, the author does not seem to find much fault with the present system although he is not blind to the unsatisfactory results to which it may occasionally lead. He even defends the attitude of the United Nations in preventing their Specialized Agencies from requesting advisory opinions of the Court in respect to legal disputes opposing them to one another or to the United Nations. In the historical introduction, the author gives a good picture of the relations between the International Labor Organization, the Council of the League of Nations, and the Permanent Court of International Justice. In several passages, the author refers with regret to the fact that the amendments to the constitution of the International Labor Organization after World War II eliminated this Organization's power to impose economic sanctions. However, these amendments are easily understandable in view of the intention of the authors of the United Nations Charter to constitute a monopoly in this respect in the hands of the Security Council. Unfortunately, the book was written before the relations between the International Court of Justice and the Specialized Agencies in general and the Administrative Tribunals of UNO and ILO in particular became an object of international controversy, due to the dismissal of several employees of UNO and its Specialized Agencies accused of communist sympathies. Yet this study merits our attention for a clear exposé and some very good ideas on a highly topical problem.

IGNAZ SEIDL-HOHENVELDERN

Israel and the United Nations. Report of a Study Group set up by the Hebrew University of Jerusalem. Prepared for the Carnegie Endowment for International Peace for its series, National Studies on International Organization. New York: Manhattan Publishing Company 1956. Pp. 322.

The Carnegie Endowment for International Peace has started to publish a series of studies on the attitude of the Government and of the people of various states towards the United Nations. The present volume merits particular attention, as the story of Israel's relations with the United Nations is mainly concerned with the problem of Israel-Arab relations. By now we all know by bitter experience the importance of this problem for the peace of the world. Thus, the greatest part of the volume deals with the efforts first of the League of Nations and then of the United Nations to create and to guarantee a National Home to what in the course of this process became the Israeli nation and with the struggle of the Arab world to undo these efforts. The Israeli authors of this volume have tried to give as objective a picture of Israel's case as

was humanly possible to them—although some facts may yet look different when seen through Arab eyes. The study is concerned only with events up to the end of 1954—yet the tragedies to come are heralded in several passages, where bitter references are made to the inability of the United Nations to prevent Arab hostile actions against Israel coupled with warnings that Israel may therefore be constrained to take the law in its own hands. The presentation of this problem would have been easier to follow had the authors kept to a strictly chronological order of events, instead of dealing first with the attitude of the League of Nations and then of the United Nations in respect of the problems of the Palestine Mandate, interrupting this theme by considerations on the ideological basis of the State of Israel and the problems presented by Israel's admission to the United Nations, and only thereafter continuing the systematic and chronological discussion of Arab-Israel relations. It would have rendered the book more valuable for reference purposes, if the references to resolutions, declarations, etc. cited in this discussion always indicated their year as well as the day and the month. Of course, a careful reader can discover the year meant by remembering having read this information before or will be able to figure it out from the references to the "Nth" General Assembly. Moreover, a map of Israel and the surrounding countries showing the various lines of partition proposed should have been included.

After a detailed study of all the aspects of the Israel-Arab problem, the book proceeds to define Israel's attitude to other United Nations problems. In this respect, attention should be drawn to Israel's claim to act as protector of Jewish interests in general and to the exposé of the sound and realistic approach of the Israeli Government on amending the United Nations Charter.

IGNAZ SEIDL-HOHENVELDERN

CARSTENS, K. *Das Recht des Europarats*. Berlin: Duncker & Humblot, 1956. Pp. 243.

If Europe as a unity, or rather a future unity, should decide to celebrate a Constitution Day, then the 5th of May might have a good chance of becoming a Continental holiday. For on that day the ten original member states of the European Council, officially called the *Council of Europe*, signed its statute at London in 1949; namely, France, the United Kingdom, Belgium, the Netherlands, and Luxembourg as the nuclear members of the Brussels pact (March 1948) against the already visible dangers from Eastern Europe, and five nations that had received and accepted invitations only a few months before the signing of the Statute: Italy, Norway, Sweden, Denmark, and Iceland. The author in his double quality as professor of law at the University of Cologne and counsel at the Foreign Office of the German Federal Republic is certainly a most competent and well-informed historian and interpreter of *Europa* as a legalistic idea, since his own country has become one of the most active and most important members of the Council.

Actually, the handy volume is a useful and well-organized textbook divided into 14 chapters, beginning with a historical survey (A) *Entstehung*, followed by (B) *Rechtsgrundlage*, a treatise, as it were, on the legalistic foundation, then by chapter (C) *Rechtsnatur*, which deals with the legalistic-philosophical implications; all the other chapters describe the rights and duties of the members and the work of the various agencies. It is therefore quite natural that chapter (G) on the Committee of Ministers and its agencies as well as chapter (H) on the Assembly should be by far the most extensive of the book; both are divided into eight subtitles.

The author's thesis is stated in chapter C: The Council is an international and not a supranational organization.

We are still very far away from the United States of Europe.

The Council of Europe is no federation according to international law, not even a loose *Staatenbund* as was the League of Nations or the United Nations presently are; significant characteristics of such a federation, competence in the field of defense, a minimum measure of coercive means against member states, are lacking. The question whether the Council of Europe is a subject of international law is answered by Dr. Carstens in the affirmative, but within certain limitations. The Council is a subject in its relations with its own member states and, of course, with those states which recognize the Council. On the other hand, no regulations have been made public regarding the Council's right of diplomatic representation, and of concluding treaties, or the privileges and immunities of its personnel, save for the special privileges granted by the French government to members of the Ministers' Committee, of the Assembly , and of the Secretariat in the city of Strasbourg, seat of the Council, pursuant to the agreements concluded among its member states.

Indeed, the *Accord Général sur les Privilèges et Immunités* declares the Council's competence to conclude private contracts, acquire property, and have access to the courts of law. Therefore, in any of the member states the Council is a subject under the respective municipal law.

Somewhat in imitation of a union (like the United States, Switzerland, the German Federal Republic, etc.) the Committee of Ministers, as an upper chamber, represents the principle of equality among the member states, each having only one vote without regard to its population. The Assembly, being the lower chamber, is composed of nationals representing the member states, appointed by their respective national Parliaments or at least according to a procedure fixed by Parliament, the number of delegates ranging from 18 for each of the four big powers to three each for the smallest. That the members should be members of their own national Parliaments is a domestic rule of their respective legislatures; "Europe" demands only that each member ought to be a national of the state represented.

The author does not appear overoptimistic on the accomplishments or even possibilities of "Europe." He sees the greatest technical difficulty in its "*Polarität*," i.e., its bicameral system without any real connection between the two chambers. The Assembly is a—*sit venia verbo—Parliaments' Parliament*, while the Ministers' Committee could be compared to a diplomatic conference of the old school; the individual statesmen being bound by their instructions, responsible only to their own governments and possessed of the *liberum veto*, since unanimous vote is prescribed.

However, there can be little doubt that the Council of Europe, should the United States of Europe ever come into existence, will be its Continental Congress.

A rich bibliography concludes the highly instructive book.

ROBERT RIE

MASON, H. L. *The European Coal and Steel Community. Experiment in Supranationalism.* The Hague; Martinus Nijhoff, 1955. Pp. 153.

To this reviewer's knowledge, this is the first book dealing with the European Coal and Steel Community (ECSC) to be published in English and by an author not belonging to any of the ECSC countries. Even apart from these features, the book merits closest attention. It contains not only a clear exposé of the aims, structure, and functioning of ECSC, but also gives us an exact and unbiased background picture of the various political and economic forces which in each of the ECSC countries first determined the shape which ECSC finally took and then influenced its activities up to

1954. This wealth of material has been gathered mainly from newspaper sources not easily accessible even in Europe and is presented by the author in an easily readable way. As far as ECSC operations are concerned the author underlines the fact, that the High Authority of the ECSC is somewhat reluctant to use the dirigist powers which are implied in the duties entrusted to it in respect of decartelization and investments. The highly technical nature of most of the cases decided as yet by the ECSC Court of Justice is apparent from the short summary of these decisions given by the author. Mason also treats the very serious setback, which the idea of European unity suffered through the rejection of the EDC, and is rightly critical of certain attempts to refloat the ideal of European unity through extending the influence of the ECSC beyond its limited scope. In the meantime, new ways have been found to revitalize the idea of European unity rendering these well-meaning attempts superfluous. In his conclusions, the author deals with the notion of supranationalism. It seems strange first of all to see this matter as well as the history of older organizations with somewhat similar features to ECSC (e.g., the European Danube Commission) discussed at the end rather than at the beginning of his book. This unusual arrangement however has the advantage of enabling the author to refer back to practical examples in order to substantiate his point of view that "supranational" is a word with no very precise legal meaning. As applied to ECSC, it designates a form of collaboration between states going beyond the customary form of international organization, while at the same time falling short of federal union. It is fortunate indeed that the first book in English on ECSC will give its readers such sober and impartial evaluation of its problems as well as so easily understandable an introduction to its complicated structure and functioning.

IGNAZ SEIDL-HOHENVELDERN

GLASER, S. *Introduction à L'Étude du Droit International Pénal.* Bruxelles: Etablissements Emile Bruylant, 1954. Pp. xii, 207.

This work relates to a recently developed and gradually evolving field of law that treats of the commission by states and individuals of acts violative of the precepts of international law in the criminal realm. Such a viewpoint came into being after the second World War, and it is the International Law Commission of the United Nations that currently concerns itself with the development of devices necessary for the practical application of this approach. The author, formerly Polish ambassador to Belgium and dean of the Polish law faculty under Oxford's auspices, has served as an official of the United Nations Commission on war crimes.

The text discusses preliminarily the meaning of international criminal law and its role in international law as a system, and then considers the relationship between international criminal law, international public law, and national criminal law. The concept of international criminal conduct is then considered, both as it applies in time of war and time of peace, such offenses as slavery, traffic in women and children, traffic in drugs and obscene matter, and counterfeiting being treated. State offenses, such as violations of international obligations and wars of aggression, are also categorized, with a well-documented historical account of the question.

The book concludes with discussions of the individual and state as subjects of international criminal law, the responsibility of individuals and the doctrine of "Act of State," the supremacy of international over national law, and the need for an international penal code. The present status of codified international law and inter-

national criminal jurisdiction is lastly described, a plea for sovereignty of law over sovereignty of states being made. Annexed are copies of the agreement between the allied states of World War II for prosecution of the war criminals, and the statute of the International Military Tribunal. An excellent bibliography of the works cited will also be found.

HILLIARD A. GARDINER

VOUIN, R.—LÉAUTÉ, J. *Droit pénal et criminologie.* Manuels Juridiques, Economiques et Politiques "Thémis". Paris: Presses Universitaires de France, 1956. Pp. 629.

It is unfortunate that this excellent study of criminal law and criminology is not available in an English translation. The aim of the "Thémis" series, as disclosed in the Publishers' Note, is to provide the French student with working materials "dans le cadre de la réforme de la licence en droit réalisée par le décret du 27 mars 1954." The text follows the usual pattern of this series by providing a concise treatment of the material without the use of footnotes: at the end of each section of text is a paragraph or two printed in small type containing a wealth of bibliographical data with brief explanatory notes. The purpose of this arrangement, the publisher tells us, is to provide in the text sufficient material, as concisely and simply stated as possible, to enable "l'étudiant pressé par une révision hâtive à la veille d'un examen" to have before him all he needs as a complete outline of the course, while the notes at the end of each section provide the necessary references for deeper, more intensive, and more relaxed study.

This is, however, very much more than a "course outline" for French students. The emphasis is, of course, on French criminal law where the emphasis *is* on law: this is clearly and (as far as this reviewer can tell) very adequately stated, but of course non-French readers can obtain equally adequate statements of French criminal law elsewhere. The principal value of this book lies in its excellent treatment of the rather recently developed "science" of criminology, and the authors manage in a masterly fashion to avoid, on the one hand, the hysterical advocation of it as the gateway to an Erewhon in criminal proceedings which has disfigured so much of what has already been written on the topic, and on the other hand, a casual dismissal of it as a psychologists' new plaything. The whole topic of criminology is discussed in a very practical and down-to-earth manner which is most refreshing.

The range of discussion in this field is wide, and what cannot be gained from the text can be gained from reference to the bibliographical notes mentioned earlier. Of particular interest are the 70-odd pages in which the writers deal with "Crime and Society" (*Le Crime et la Société*), and the 100-odd pages on "The Delinquent". These make fascinating reading, but this is not to say that there are not other parts of the book which are equally stimulating. The writing itself is lucid and concise, and has the typically French precision which is unfortunately largely lacking in so much English writing.

It is hoped that enough has been said, in the space available, to make it clear that this is a very desirable book indeed. Not only the student, but anyone interested in reading a sane and balanced (and it is hardly necessary to add, highly informed) view of the place and function of criminal law in the modern social structure will find it of considerable value.

B. D. INGLIS

PERROT, R. *De l'influence de la technique sur le but des institutions juridiques.* Paris: Recueil Sirey, 1953. Pp. 215.

VERGNAUD, P. *L'idée de la nationalité et de la libre disposition des peuples dans ses rapports avec l'idée de l'État.* Paris:

Éditions Domat-Montchréstien, 1955. Pp. 258.

These two theses, the first a *thèse de doctorat de Droit Privé* and the second *de Droit Public*, were awarded the *Prix Dupin l'Aîné* and the *Prix de la Faculté* by the Paris Law School.

The first work was published with the assistance of the French Department of Education. Its author is now Professor at the University of Strasbourg. Mr. Perrot remarks, with Ihering, that finality is to human actions what causality represents to the material world. In its particular field, law seeks to regulate the relations between human beings whose actions are determined by the aims they pursue. Experience shows, however, that despite the basic principle of the autonomy of the will, it often happens that an act undertaken in the pursuance of a certain goal leads to a result slightly, or grossly, different. The explanation comes from the fact that in order to penetrate on the juristic level, the human will must have recourse, as for a vehicle, to *technique*, a term in which the author includes all "devices" (necessarily formal and hence somewhat rigid) which give juristic efficiency to the human will pursuing a legal finality. A comparison is suggested with human thought, often deformed by the necessity of using the indispensable *technique* of expression, represented by words. Through a great number of juristic institutions and cases, the author studies what Professor Le Balle, in his Preface, calls the "revolt" of the individual will, its efforts to make its goals prevail despite the obstacles opposed by *technique*, which usually are not fully adequate to carry all the subtleties intended by the human will. Although not "custom-made" but just "ready-made," technical legal devices and institutions are nevertheless indispensable to the life of the law, and in the conclusion it is stated that the progress of legal science is specifically assured by the learned and skillful manner in which every interpreter of the law pushes the specialization of technique towards a continuous refinement. This sketchy summary does not render justice to a relatively short but clear and profound study in a delicate topic of private law, bordering the field of philosophy of law, which deserves the attention of readers of French legal literature interested in the subject. Professor Perrot's doctoral thesis continues the tradition illustrated by so many celebrated *thèses* of the past which have added fame to the Paris Law School, stronghold of the *civilistes*.

The second of the above works is a study of the political thinking of the years 1870 to 1950 on the relationship between the idea of nationality and that of the sovereign state. The book is divided into two parts. The first (The West in search of the Grail: Individual, Nation, Nationalism) contains chapters on Renan, Barrès, Maurras, Jaurès. The second part (The New Era: The Myth against the West) includes two chapters entitled, respectively, "Hitler" and "From Lenin to Stalin." In an avant-propos and an introduction of 50 pages, the author traces the history of political thinking in this field (Mazzini, Hegel, Burke, Rousseau, etc.) back to the writings of Machiavelli, where he detects the first aspirations of a sectionalized community, as Italy was in 1500, towards the nation-state form of the French type. In his *Conclusion*, the author attributes the reverses which the idea of nationality has suffered to what he calls the contradiction between the nominalist and realist conceptions of a nation. The 19th century has espoused the nominalist and liberal French conception, for which the right of self-determination is the logical consequence of the idea that a nation is nothing else but a certain number of free individuals. This conception, however, and the victories achieved by the principle of self-determination, have not brought complete satisfaction to the individual. Once national freedom

was achieved, the individual found himself in opposition to his own national government in the name of the same ideal of liberty for which he had fought against the foreign nation-state in the past. From such feelings of frustration, the author explains, stemmed the "realistic" conception claiming to define the nation as reflected by race and class—two terms with great rallying force for the disoriented masses of the 20th century. Mr. Vergnaud believes that the substitution of the realist for the nominalist approach has not brought any better solution and that the problem needs to be thought anew in its entirety; it is implied that, in the last instance, its outcome will decide what our world will be, a planetary empire or a balanced system of Powers.

As Professor J. J. Chevalier points out in his Preface, the book represents a valuable contribution to the study of political romanticism, stressing the influence which the romantic thinking of the 19th century had upon the idea of nationality. Yet, excellent as a thesis, the book leaves the reader with some unfulfilled expectations: nothing is said about the influence which the ideas of nationality and self-determination had in historical actuality, in the developments of the 19th and 20th centuries, or in the constitutional life of those states which were founded upon these ideas. It is true that the subtitle—*Étude des Doctrines Politiques Contemporaines*—limits the scope of Mr. Vergnaud's thesis to a discussion only of political thinking on the subject.[1] But even so, the book could have been more complete—at least as far as Europe is concerned—had it included an analysis of the political thinking in this matter of writers from the Central and East European countries, originating in the ideas of nationality and self-determination, after the First World War.

G. M. RAZI

[1] The frame of the book is set forth by the following quotation from Professor Chevalier whose lectures in Comparative Constitutional Law and in History of Political Ideas have inspired and guided the author's work: ". . . The precise relationship between ideas, generally, and practical action is difficult to be defined and ascertained . . . But it is certain that political ideas have a more intimate relationship with action than just other ideas."

ALBIG, W. *Modern Public Opinion.* New York: McGraw-Hill Book Company, Inc. 1956. Pp. xii, 518.

This is a careful revision and modernization of the author's *Public Opinion* (1939). This book has been for long one of the best standard works on public opinion, its psychological processes, measurement, recording and polling, censorship and propaganda. The present volume includes only the best and most significant of the recently published contributions to these topics, although the basic structure and organization of the former volume has been retained. Those familiar with the earlier book will find the present volume interesting mainly because it sums up the matured thought of Professor Albig, in which the change of the times is so admirably reflected. For though he is amazed by the energy and productivity of American scholarship in the intervening years, he confesses: "yet, when I review what I have learned of meaningful, theoretical significance about communication and about the theory of public opinion, I am not so encouraged" (V–VI).

The "central and critical issue of modern life," which causes most concern to the author, is the "manipulation of publics and masses": an activity in which there is "no simple dichotomy of opposites . . . it is a question of the degree of exploitation or enlightenment and to what ends" (488). Not only dictators but men of good will as well are dependent on the use of mass media of communication which "impose their own limits on individuality and upon integrity. Individuality . . . is somewhat curbed

by the diffused, uniform media content which inexorably presses toward the uniform society and the conforming individual. And the mass media, as indirect, non-face-to-face communication, strains integrity because of the opportunities for influence by chicanery and illusion" (489). The author concludes that mass media bear responsibility for the guidance of American culture values since they are "most impressive molders of public opinion, attitudes and values." In his view, the implementation of this responsibility "with practices evidently in the general public interest" is the prize for which "one of the most vital battles between social scientists, politicians and the commercial mass media" is being fought (503).

Indeed, throughout this volume the author valiantly fights against the cult of irrationalism, the stifling and debilitating impact on public opinion of the exaggeration of such fashionable trends as "escape from freedom," "anomie," and the like. European experience with mass media may reassure American experts that the distorting effect produces its own antitoxins. Latterly, the events in Hungary and Poland taught everybody that public opinion under communist rule is not exactly what had been expected after years of indoctrination. In this book, two recent studies are quoted which may allay fears as to the inescapable uniforming effect of mass media. In one of them "in spite of the lowering and ominous climate of international conflict in 1954, including the possibility of atomic disaster, some 80 per cent of the men and women interviewed stated that their primary worries were solely personal and family problems," while "among the community leaders 22 per cent were worrying about world problems . . . and 5 per cent of the leaders expressed some worries about civil liberties and the internal Communist threat" (341). Though this state of affairs is far from being ideal, it certainly does not make one overly concerned about the impact of mass media. In another study "the authors make a strong case for the frequently more dominant influence being the horizontal communication among intimates, rather than the downward vertical force of influence from important national leaders or mass media" (358). This has been the answer of the audience, everywhere, to the manipulation of public opinion.

BARNA HORVATH

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Bulletin

Special Editor: KURT H. NADELMANN

American Foreign Law Association

REPORTS

AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION—The 36th Annual Meeting of the American Branch of the International Law Association was held in New York City on May 10 and 11, 1957. "Nationalization of Foreign Property" was discussed at the opening session. Professor Cecil J. Olmstead, of New York University, led the discussion. The annual dinner was addressed by Mr. John B. Howard, of the Ford Foundation, who spoke on "International Legal Studies," and Mr. D. H. N. Johnson, Reader in Public International Law in the University of London, currently with the Legal Department of the United Nations, who spoke on "High Seas and Marginal Seas." Vice-President Pieter J. Kooiman presided.

At the business meeting, the representatives of the Branch on the United States Observer Delegation to the Eighth Session of the Hague Conference on Private International Law, Messrs. Kurt H. Nadelmann and Willis L. M. Reese, reported on the Conference. The Branch adopted resolutions (1) congratulating the Department of State upon its decision to have the United States represented by an Observer Delegation and expressing the hope that this decision will set a precedent to be followed on future similar occasions; (2) suggesting to the National Conference of Commissioners on Uniform State Laws that it consider the subject of the Hague Draft Convention on Selection of an Exclusive Forum in International Sales as a topic for uniform legislation; (3) favoring establishment of a permanent body to advise both federal and state interests how they can best proceed, in view of the federal structure of the United States, to aid in attainment of unification of law on the international level.

Reports were received from Walter J. Derenberg, chairman of the committee on Trade-Marks and Copyrights, and Martin Domke, chairman of the committee on International Commercial Arbitration. The Branch adopted a resolution recommending representation of the United States at the forthcoming Conference on International Commercial Arbitration in May 1958.

The Secretary reported on the plans for the next conference of the International Law Association, which will be held in *New York City at Vanderbilt Hall early in September, 1958*, with the American Branch as host association. Professor John N. Hazard, of Columbia University, led a discussion on "Legal Aspects of Peaceful Coexistence," which figures on the provisional agenda of the conference.

The following officers were elected: Clyde Eagleton, president; Pieter J. Kooiman and John N. Hazard, vice-presidents; Cecil J. Olmstead, hon. secretary and treasurer. Members of the Executive Committee: Homer G. Angelo, William W. Bishop, Martin Domke, Walter J. Derenberg, Richard N. Gardner, Oscar R. Houston, James N. Hyde, Arnold W. Knauth, Samuel K. Kopper, John G. Laylin, Oliver J. Lissitzyn, Myres S. McDougal, Kurt H. Nadelmann, Willis L. M. Reese, Louis B. Sohn.

K. H. N.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS—

At the 66th annual session of the National Conference of Commissioners on Uniform State Laws, held in New York from July 8 to July 13, 1957, it was decided to recommend to the governing body of the American Bar Association the appointment of a special committee on International Unification of Private Law, to make a study of what is now being done in this field and to report the results, together with the Committee's recommendation concerning any action that should be taken. The report accompanying the recommendation noted that efforts toward international uniformity in laws had never come within the scope of the activities of the Conference, that, in recent years, the volume of effort in various countries of the world toward international unification of private law had become of such a magnitude and the importance thereof was of such significance to citizens of the United States, that the Conference believed it should no longer remain indifferent to these activities; that already there were some drafts in the area of proposed international unification of private law on which American features have not been impressed as extensively as seemed desirable. The report noted that Mr. Joe C. Barrett, the immediate Past President of the Conference, had attended the Barcelona meeting of representatives of specialized organizations interested in unification of law, held under the sponsorship of the International Institute for the Unification of Private Law, and the Eighth Session of the Hague Conference on Private International Law, and that it was Mr. Barrett's recommendation to the National Conference that close and continuous observation should be made of all attempts toward international unification of private law, and that all reasonable efforts should be made to impress drafts with as many American features as possible.

At its July, 1957, meeting in New York, the House of Delegates of the American Bar Association acted in accordance with the recommendation of the National Conference of Commissioners on Uniform State Laws. A Special Committee has been appointed, with Joe C. Barrett, of Arkansas, as chairman.

K. H. N.

SECTION OF INTERNATIONAL AND COMPARATIVE LAW OF THE AMERICAN BAR ASSOCIATION—The first half of the annual meeting of the Section of International and Comparative Law of the American Bar Association was held in New York on July 12, 1957. The meeting opened with the traditional comparative law breakfast sponsored jointly by the Section and the American Foreign Law Association. The latter was represented by its Vice-President, David E. Grant, who served as co-chairman with John N. Hazard, who represented the Section. Speakers were Martin Domke of New York who presented a case discussion of foreign law in American courts, and Harry LeRoy Jones of Washington who discussed pitfalls which he finds in the opening of the New York Interpleader Compact to foreign adherents. The speeches will be printed in the Proceedings of the Section.

The annual business meeting of the Section was highlighted by the presentation of reports by chairmen of committees of the Section. Of primary interest to comparative lawyers was the preliminary report of Ernest Angell of New York who is preparing for the Section and the International Committee of Jurists a composite of the views of the American Bar on the nature of the Rule of Law in the United States. This is to be a part of a discussion at a world congress to be held in New Delhi in 1959, to determine the major elements of the Rule of Law as understood by lawyers and judges in countries whose Bar Associations cooperate with the International Commission of Jurists.

The Section revised its by-laws to provide for expanded activities of committees. Three Vice Chairmen will replace the second Vice Chairman, each to have charge of the work of a group of committees, one working in international law fields, one in the comparative law

fields, and the third working on problems of international organization. The three persons chosen for the new positions are in the same order, Harry LeRoy Jones, John N. Hazard, and Eugene D. Bennett. A new Chairman was elected to succeed Victor C. Folsom, namely Homer G. Angelo of San Francisco, and a new Vice Chairman of the Section was chosen, J. Wesley McWilliams of Philadelphia. Harry A. Inman of Washington succeeds Mrs. Helen L. Clagett as Secretary. She, James O. Murdock of Washington, and Max Chopnik of New York become members of the class of the Council of the Section to serve until 1961.

JOHN N. HAZARD

LONDON MEETING OF THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW OF THE AMERICAN BAR ASSOCIATION—On Thursday, July 25th, 1957, at the Senate House in Russell Square a joint meeting was held together with the Institute of Advanced Legal Studies of the University of London. Mr. Victor C. Folsom, the outgoing Chairman of the Section of International and Comparative Law of the American Bar Association and Sir David Hughes Parry of the University of London were Co-Chairmen. Because of the great interest in the subject matter the meeting was exceptionally well attended. Since the NATO Status of Forces was one of the subjects for discussion the meeting was attended by many Staff Judge Advocates of the Army, Navy, and Air Force, including the Judge Advocate General of the Navy, Rear Admiral Chester Ward.

The first topic that was discussed dealt with the "Extraterritorial Application of Antitrust Laws," and the speakers for this part of the program were Professor Otto Kahn-Freund, LL.M., Dr. Jur., Professor of Law in the University of London and Arthur H. Dean, LL.B., Sullivan & Cromwell, New York. The second part of the program was entitled "Criminal Jurisdiction in the NATO Status of Forces Agreements" with the following speakers: G. I. A. D. Draper, LL.M., Lecturer, Faculty of Laws, Kings College, University of London and lately Assistant Director of Army Legal Staff, War Office, and Professor Richard R. Baxter, LL.M., Assistant Professor of Law, Harvard University Law School, lately attorney in the office of the Secretary of Defense of the United States Government.

The meeting was followed by a buffet luncheon tendered by the University of London. At this luncheon which evidenced splendid planning and was consequently most enjoyable, all of the American lawyers and jurists attending were afforded the opportunity of meeting all of the distinguished British guests and barristers in an informal and social manner. The occasion was indeed a memorable one.

EDWARD D. RE

SECOND INTERNATIONAL CONGRESS OF LABOR LAW—The Second International Congress of Labor Law met in Geneva on September 12–14, 1957. About two hundred delegates from some twenty-five countries in Europe, Asia, Africa, and North and South America attended the Congress. Sessions of the Congress were devoted to reports on the law of various nations with respect to (1) the content, legal effects, application, and execution of collective agreements and (2) conflicts of laws in labor matters. Mr. Stuart Rothman, solicitor of the Department of Labor of the United States, delivered a particularly interesting paper on the law of the United States with respect to the second of these topics. The Congress voted favorably on a resolution looking to the establishment of an International Association of Labor Lawyers and appointed a committee to make plans toward this end.

PAUL R. HAYS

SALZBURG SEMINAR IN AMERICAN STUDIES—The fifth annual session of the Salzburg Seminar in American Studies devoted to American Legal Institutions was held at Schloss Leopoldskron from July 21 to August 17, 1957. There were 62 participants from 15 countries, most

of them being countries of the Continent. The faculty of the session was composed of: Professor John P. Dawson, Professor of Law, Harvard University; Judge William H. Hastie, Judge, United States Court of Appeals, Third Circuit; Prof. Fleming James, Jr., Professor of Law, Yale University; Prof. John G. Palfrey, Professor of Law, Columbia University; Prof. Albert M. Sacks, Professor of Law, Harvard University. The entire group of faculty and students met in general sessions six days a week for discussion of the Institutional Framework of American Law, including a general survey of American legal method, problems of legislative interpretation, the constitutional setting, the history and main characteristics of American civil procedure, methods and policies in the regulation of private enterprise, and control of administrative action. Seminars meeting six hours each week were also given on the following subjects: Selected Problems in American Law of Contracts (Dawson), American Constitutional Law (Hastie), Bases of Civil Liability in American Law for Accidental Harms (James), Atomic Energy: A Case Study in Government-Industry Relations (Palfrey), and American Administrative Law (Sacks).

ANNOUNCEMENTS

INTERNATIONAL ACADEMY OF COMPARATIVE LAW. Program of the Fifth International Congress of Comparative Law, Brussels, 4–9th August, 1958.

The International Academy of Comparative Law, at its session in London on October 8, 1956, asked the Secretary General to circulate the list of questions drafted for the program of the Fifth International Congress of Comparative Law. In compliance with this request, the list is made available.

A circular recommending the establishment of national committees has been sent separately. The following general directives with regard to the national and general reports are given.

1. *National reports:*

It will be the task of the national committees to decide the questions for their national reports and to designate their reporters at their discretion.

The national reports should be prepared in the language of their authors. The national committee should, however, produce a translation at least, in French or in English. In general, these reports should not exceed 5000 words. They should reach the national committee before January 31, 1958, and be submitted by the president of this committee (Professor Hessel E. Yntema, University of Michigan Law School, Ann Arbor, Michigan) to Professor F. de Solá Cañizares, 1, rue Longpont, Neuilly-sur-Seine, France, before February 15, 1958.

2. *General reports:*

The Academy will consider these reports and designate general reporters.

Those designated will prepare their reports in their national languages, but will, so far as possible, assure a translation by their national committees into French or English. These general reports must reach Professor de Solá Cañizares not later than June 1st, 1958.

The Academy reserves the right to appoint one or more reporters for the questions which have not been the subject of any report.

List of Subjects

SECTION I (GENERAL)

A. THE LAW OF ANTIQUITY.
   1) The concept of property in the laws of antiquity.

B. LEGAL HISTORY.
   1) Family property and individual property.
   2) The law of absolute ownership and division of ownership.

C. CANON LAW.
   1) The ordinary and extraordinary

forms of marriage in the various canon laws.
2) Good faith and its function in canon law.
3) Usage in modern canon law, its nature, its influence, its relationship with custom.

D. LEGAL ETHNOLOGY.
1) The problems of private and collective property among primitive peoples.
2) The problem of putting in writing customary laws; interest, difficulties, methods.

E. ORIENTAL LAW.
1) Statutory amendments of the personal law of Hindus since Indian independence.
2) A great Moslem jurist: Mohammad Ibn Al-Hasan Al-Shaibani.
3) The movement for codification in the Moslem countries. Its relationship with Western legal systems.
4) Moslem custom and case law. (Orf et Amal).
5) Autonomy of the will in Moslem Law.

F. LEGAL PHILOSOPHY.
1) The rule of law.
2) The relativity of legal concepts.

G. THE STUDY AND TEACHING OF COMPARATIVE LAW AND UNIFICATION.
1) The study of comparative law as a means of investigating subjects susceptible of international unification.

SECTION II

A. CIVIL LAW.
1) The control of judicial or administrative authorities over the settlement of decedents' estates.
2) The doctrine of liability without fault.
3) Tendencies of legislation and modern case law towards an equalization of legal status.

B. CONFLICT OF LAWS.
1) The transfer of a company's registered office.
2) The effects of foreign divorce decrees.

C. CIVIL PROCEDURE.
1) The preventive action outside of real property litigation.
2) The execution of arbitration awards.

D. AGRICULTURAL LAW.
1) The European common market and agrarian legislation. Themes and systematic tendencies: harmonize or unify? Limits.
2) Credits for capital investment in agriculture and the security therefor.

SECTION III

A. COMMERCIAL LAW.
1) Preventive measures in bankruptcy.
2) Participation of workers in the management and profits of the business.
3) Nuclear energy and insurance law.

B. INTELLECTUAL PROPERTY RIGHTS.
1) Development of the obligatory licence.
2) The entry into effect in 1956 of the Universal Copyright Convention.

C. LABOR LAW.
1) Stability of employment.
2) Law of paid vacation.

D. AIR LAW.
1) System and limits of liability in national and international aviation law.

SECTION IV

A. PUBLIC LAW.
1) The problem of the security of the State and liberty.
2) The institutionalization of political parties.
3) Proportional representation reconsidered.
4) Execution of judgments against the property of the government and of public services.
5) Legal status of the press, radio, television, and public performances and the limits of freedom of expression.

B. CRIMINAL LAW.
1) New procedures of scientific in-

vestigation and the protection of the accused's rights.
2) The notion of the confidential medical communication in comparative criminal law.
3) Criminal sanctions in economic law.

C. PUBLIC INTERNATIONAL LAW.

1) The conditions under which States accord to ships the right to hoist the national colors.
2) The legal regulation of the seas and of the continental shelf.
3) Zenith and decay of the doctrine of non-intervention of States in the internal affairs of other States.

VARIA

A.B.A. SECTION OF INTERNATIONAL AND COMPARATIVE LAW BULLETIN—The Section of International and Comparative Law of the American Bar Association has decided to publish, in addition to the *Proceedings*, a quarterly Bulletin to bring committee reports and other items of current interest. The May, 1957 and July, 1957, issues have been received. Editor is Max Chopnik, New York; Assistant Editor: Mrs. Helen L. Clagett, Washington, D.C.